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In the

Supreme Court of the United States

October Term, 1971

No. 71-858

THOMAS RICCI,

Petitioner,

vs.

CHICAGO MERCANTILE EXCHANGE, an Illinois not-for-profit corporation, EVERETTE B. HARRIS, WILLIAM PHELAN, LEO MELAMED, THE SIEGEL TRADING COMPANY, a corporation, and JOSEPH E. SIEGEL,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

6/14/69 Filed Complaint
6/14/69 Filed Designation
6/14/69 Filed Affidavit rule 39
6/14/69 Issued summons and 6 copies with 6 copies of complaint

6/ 9/69 Filed Notice by Defendants of Deposition of Thomas Ricci and Anthony A. Ricci

6/17/69 Filed Stipulation

6/17/69 On stipulation of parties, through their respective attorneys, enter order extending to July 11, 1969 defendants time to answer or otherwise plead to the complaint herein. Parsons, J. Mailed Notices 6/18/69

7/ 9/69 Filed Appearance of Siegel Trading Co. and Joseph Siegel

7/ 9/69 Filed Affidavit rule 39

7/ 9/69 Filed Motion to dismiss by Siegel Trading Co. and Joseph Siegel

7/10/69 Filed Notice and Motion to compel answers to questions propounded to Thomas Ricci and Exhibits.

7/10/69 Filed Motion of Chicago Mercantile Exchange, Everette B. Harris William Phelan and Leo Melamad to dismiss for lack of jurisdiction

7/10/69 Filed summons returned served

7/11/69 Filed Notice of Motion

7/11/69 Enter order defendants The Siegel Trading Co. Inc. and Joseph E. Siegel given extension of time to August 9, 1969, to file brief in support of motion to dismiss. Plaintiff given 30 days after August 9, 1969 to file responsive memorandum. Hoffman, J.
Mailed notices 7/14/69

7/11/69 Filed Notice and Motion to compel answers to questions propounded to Thomas Ricci and Exhibits A and B

7/11/69 Enter order motion of defendants Chicago Mercantile Exchange, William Phelan and Leo Melamed for an order requiring answers to questions propounded to plaintiff Ricci and not answered by him, and for an order that the deposition of Thomas Ricci be reset for the purpose of allowing petitioners to further inquire into the matters as to which said Thomas

Ricci refused to answer, entered and continued to July 16, 1969 at 10:00 a.m. before Judge Parsons. Motion of defendants Siegel Trading Co. Inc. and Joseph E. Siegel for an extension of time to file on or before August 9, 1969 a brief in support of motion to dismiss entered and continued to July 16, 1969 at 10:00 a.m. before Judge Parsons-Hoffman, J. Mailed notices 7/14/69

7/14/69 Filed Notice of Motion re-extension of time to file brief in support of motion to dismiss

7/14/69 Filed Notice of Deposition of Thomas Ricci

7/16/69 Defendants motion for extension of time to file on or before August 9, 1969 a brief in support of motion to dismiss, is allowed. Motion of defendants for an order requiring answers to questions propounded to plaintiff and not answered by him, is allowed. Plaintiff to answer questions as set forth within two weeks of filing of interrogatories setting forth additional questions, also to be answered. Order cause continued to September 29, 1969 for report on status-Parsons, J. Mailed notices 7/17/69

7/17/69 Filed Interrogatories propounded pursuant to order of July 16, 1969

7/17/69 Filed Deposition of Thomas Ricci

7/30/69 Filed Answer of Thomas Ricci to Interrogatories propounded pursuant to order of Court entered July 16, 1969

8/11/69 Filed Memorandum in support of Motion to dismiss by Chicago Mercantile Exchange, Everette B. Harris, William Phelan and Leo Melamad

8/11/69 Filed Memorandum of Defendants Joseph E. Siegel and The Siegel Trading Co., Inc. in support of Motion to dismiss

8/19/69 Filed Notice of Motion and Motion for order that depositions not be taken and Objection to Notice of Deposition

8/21/69 Order motion of defendants Everette B. Harris and Leo Melamed for an order that the depositions of said defendants not be taken is denied and the Court directs that said depositions be taken-Marovitz, J.
Mailed notices 8/21/69

8/21/69 Filed Stipulation

8/21/69 Enter order on stipulation to continue the depositions of Everette B. Harris and Leo Melamed to September 15, and allow Plaintiff to October 6, 1969 to file memorandum in opposition to motions to dismiss and defendants to reply 10 days thereafter-Marovitz, J. Mailed notices 8/21/69

8/21/69 Filed Notice of Depositions of Everette B. Harris and Leo Melamed

9/29/69 Filed Notice of Motion

9/29/69 Filed Motion for extension of time to file memorandum in opposition to defendants motion to dismiss

9/29/69 Filed Notice of Motion for Production of Documents and Affidavit in support thereof

9/29/69 Plaintiff given 20 days to file answering brief in opposition to defendants motions to dismiss. Order cause continued to October 27, 1969 for ruling on motions to dismiss. Plaintiff's motion for an order on certain defendants to comply with notice of deposition and to produce certain documents, and for assessment of costs and attorneys fees is entered and continued to October 27, 1969-Parsons, J.
Mailed notices 9/30/69

10/20/69 Filed Brief of Plaintiff's answer to Defendants motion to Dismiss

10/24/69 Filed Reply Brief in support of Motion to dismiss of defendants Joseph E. Siegel and The Siegel Trading Co.

11/ 3/69 Filed Plaintiff's objections to Memorandum of Opinion

11/ 3/69	Defendant's motion to present Memorandum Opinion and plaintiff's objections thereto are taken under advisement and ruling on November 12, 1969-Parsons, J. Mailed notices 11/4/69
10/27/69	The Court rules orally from the bench re: motions to dismiss. Counsel to prepare and submit within a short date findings of fact, conclusions of law and order consistent with the Court's ruling-Parsons, J. Mailed notices 11/4/69
11/12/69	Enter order ruling on defendants motion to present Memorandum Opinion and Plaintiff's objections thereto is continued to November 25, 1969-Parsons, J. Mailed notices 11/13/69
11/25/69	Motion of defendants to dismiss the complaint is allowed, and it is so ordered-Parsons, J. Mailed notices 11/12/69
12/17/69	Filed Notice of Appeal by Plaintiff
12/17/69	Mailed copy of Notice of Appeal to Lee A. Freeman and Max and Herman Chill
12/18/69	Filed Bond on Appeal
1/16/70	Filed Deposition of Thomas C. Ricci
1/16/70	Filed Continued Deposition of Thomas Ricci
1/22/70	Clerk's File copy of Transcript of Proceedings had on November 25, 1969 filed by Official Court Report
1/20/70	Filed Deposition of Leo Melamed
1/23/70	Filed Stipulation as to Record on Appeal
6/17/71	Opinion and Order of the Court of Appeals for the Seventh Circuit.
10/ 5/71	Order denying petition for rehearing and petition for rehearing *en banc*

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

(Civil Action No. 69-C-1030)

COMPLAINT

JURISDICTION AND VENUE

1. This action is brought under Sections 4 and 16 of the Act of October 15, 1914, as amended, commonly known as the Clayton Act, 15 U.S.C. Sec. 15 and 26, for violations of Sec. 1 of the Act of July 2, 1890, as amended, commonly known as the Sherman Act, 15 U.S.C. Sec. 1. Jurisdiction is conferred on the Court by virtue of 28 U.S.C. Sec. 1337.

2. Defendant, Chicago Mercantile Exchange, is a corporation incorporated under the Laws of the State of Illinois and is doing business in the Northern District of Illinois. The Siegel Trading Company is a corporation and is doing business in the Northern District of Illinois. Each of the individual defendants resides in the Northern District of Illinois. The venue of this Court is thus duly established under 28 U.S.C. Sec. 1391 (b) and (c).

DESCRIPTION OF PARTIES

3. Plaintiff, Thomas Ricci, (hereinafter referred to as "Ricci") is an individual and citizen of the State of Illinois and a member of the Chicago Mercantile Exchange, having his principal place of business at Chicago, Illinois, and engaged in the business of a commodity broker and floor broker trading in commodities and commodity futures on his own account and on behalf of others for a commission, including the purchase and sale of such commodities in interstate commerce.

4. Defendant, Chicago Mercantile Exchange, is a corporation organized and existing under the General Not-For-Profit Corporation Act of the State of Illinois, having approximately 500 members and engaged in operating at Chicago, Illinois, a commodity exchange for trading among

its members in various commodities and commodity futures in interstate commerce.

5. Defendant, Everette B. Harris, is the President of the Chicago Mercantile Exchange. The defendant, William Phelan, is Vice President of the Chicago Mercantile Exchange in charge of audits and investigation and the defendant, Leo Melamed, is Chairman of the Board of Directors of the Chicago Mercantile Exchange.

6. The defendant, Siegel Trading Company, is a corporation and a Clearing House member of the Chicago Mercantile Exchange. The Clearing House of the Chicago Mercantile Exchange is an agency of the Exchange existing to facilitate the speedy adjustments of contracts made by its members. The Clearing House is compromised of a number of members of the Chicago Mercantile Exchange known as clearing members. In order for a corporation to become a member of the Exchange two of its officers or directors must be members of the Chicago Mercantile Exchange.

7. The defendant, Joseph E. Siegel, is the President of the Siegel Trading Company.

8. By virtue of the foregoing, the plaintiff, "Ricci" has until the occurrences hereinafter set forth:

(a) Freely competed in the purchase and sale of various commodities for sale and delivery in interstate commerce;

(b) Freely competed in the purchase and sale of various commodities for future delivery of large quantities of such commodities in interstate commerce;

(c) Freely executed futures contracts on behalf of himself and on behalf of others for a commission large quantities of such commodities in interstate commerce.

9. That during the times herein mentioned the Chicago Mercantile Exchange was designatee of the Secretary of Agriculture as a "contract market" for future trading of

commodities, pursuant to the provisions of the Commodity Exchange Act, as amended, (7 U.S.C. Sec. 1-17 (a)).

10. That during all the times herein mentioned, the Exchange has enacted or caused to be enacted by its Board of Governors the following pertinent rules, by-laws and regulations:

RULE 307: SALE OF MEMBERSHIP. "Membership in the Exchange is a personal privilege subject to sale and transfer only as authorized herein. When a member or the legal representative of a deceased or incompetent member desires to sell a membership, he shall sign an authorization to transfer in such form as shall be prescribed by the Board. An individual who desires to purchase a membership shall notify the President to such effect and when an agreement with a seller shall have been made shall sign a confirmation of purchase and shall deposit with the President a transfer fee in the amount of $100.00 and also a certified check, payable to the Exchange, for the amount of the agreed purchase price."

RULE 311: PRIORITY OF LIENS AGAINST MEMBERSHIP.

"Upon any sale of membership owned by a member, whether by the member or by the Board, the proceeds of sale shall be applied to the following purposes and in the following order of priority:

A. First Priority. All dues, fines, contributions, charges and other indebtedness due to the Exchange from the member whose membership is transferred;

B. Second Priority. If said membership has been pledged to the Exchange as security for the indebtedness of a Clearing Member to the payment of such indebtedness;

C. Third Priority. Sums due to creditors who are members or clearing members of the Exchange or who are registered corporations or partnerships under Rule 321 E on all claims filed against the member whose mem-

bership is transferred to the extent that such sums shall be determined by the Board to have arisen out of Exchange transactions and shall have been allowed by the Board. If the amount of such claim is contingent or cannot be immediately ascertained, the Board may direct an amount be withheld from the proceeds which it may deem sufficient to cover such claim when the amount of the same is ultimately ascertained. In determining the amount of a claim, the Board shall deduct the fair value of any collateral held therefor and the Board may require that all collateral held by a creditor be disposed of before passing on the claim.

No Other Liens Shall Be Recognized. Liens for money advanced for the purchase of a membership, or advancements against the same, or claims growing out of non-Exchange transactions shall not be recognized."

RULE 313. FILING CLAIMS. "In order for a member to establish a lien and to become entitled to his right under Rules 311 and 312, he shall file with the President a statement of his claim prior to the transfer of membership. Claims filed subsequent to the transfer but previous to any payment to the seller, which are allowed by the Board, may be paid by the Board out of any surplus remaining after all other claims described in Rule 311 have been paid in full and such claims shall be paid in the order of filing."

RULE 322. QUALIFICATIONS TO TRADE. "A member may be qualified to trade on the Spot and To-Arrive Calls provided he has been authorized by a firm or corporation which has been qualified pursuant to Rule 810 to engage in trading on said calls. A member may be qualified to trade on the futures call provided he has been authorized by a firm or corporation which is a Clearing Member."

RULE 324. COMMODITY EXCHANGE ACT. "Members of the Exchange are required to comply with all lawful provisions of the Commodity Exchange Act and the

rules and regulations thereunder lawfully promulgated by the Secretary of Agriculture and the rules of the Exchange shall be construed to conform thereto."

COMMODITY EXCHANGE ACT, as amended, 7 U.S.C. 1-17a Sec. 5(f)(9). "The Secretary of Agriculture is hereby authorized and directed to designate any board of trade as a "contract market" when, and only when, such board of trade complies with and carries out the following conditions and requirements:

"Enforce all bylaws, rules, regulations, and resolutions made or issued by it or by the governing board thereof or by any committee, which provide minimum financial standards and related reporting requirements for futures commission merchants who are members of such contract market, and which have been approved by the Secretary of Agriculture."

COUNT I

11. On or about May 1, 1967, the plaintiff, "Ricci", purchased a membership in the Chicago Mercantile Exchange and became a member thereof as a qualified broker to trade for himself and for others, in accordance with the rules and regulations of the Chicago Mercantile Exchange and The Commodity Exchange Authority.

12. That at all times hereinafter mentioned the plaintiff, "Ricci", was and still is engaged in the business of broker and trader on the Chicago Mercantile Exchange, executing future contracts on behalf of himself and for others on commission of large quantities of commodities in interstate commerce.

13. That in order to become a member of the Chicago Mercantile Exchange, the plaintiff, "Ricci", was required to purchase said membership in the Chicago Mercantile Exchange with his own funds and that the membership committee of the Chicago Mercantile Exchange would not approve the plaintiff's membership unless a statement in writing was made that the membership was purchased with plaintiff's own funds.

14. That from on or about May 1, 1967, to on or about February 11, 1969, the plaintiff, "Ricci", as a member of the Chicago Mercantile Exchange continued to trade therein on behalf of himself and others; thereafter the defendant, Chicago Mercantile Exchange, wilfully, unlawfully, knowingly and maliciously confederated, combined and conspired and agreed with Siegel Trading Company, Joseph E. Siegel, together with Everette B. Harris, William Phelan and Leo Melamed, defendants herein, to prevent the plaintiff, "Ricci", from continuing as a member of the Chicago Mercantile Exchange and to trade and transact his business in interstate commerce as hereinabove alleged.

15. That on or about February 11, 1969, when the plaintiff, "Ricci", as a member of the Chicago Mercantile Exchange was informed by the defendants, Chicago Mercantile Exchange and Everette B. Harris, President, that the defendant, Siegel Trading Company, claimed to be the owner of his membership in the Chicago Mercantile Exchange, the plaintiff, "Ricci" thereupon notified and informed the Chicago Mercantile Exchange, Everette B. Harris, William Phelan and Leo Melamed, defendants herein, that he was the owner and holder of a membership of the Chicago Mercantile Exchange; that the Siegel Trading Company was indebted to him in the sum of approximately $18,175.00 for floor brokerage fees from May 19, 1967, thru February 11, 1969, and that there was an offset of $15,000.00 for which the plaintiff, "Ricci", was indebted to the Siegel Trading Company on their loan to him for his original acquisition of a membership in the Chicago Mercantile Exchange, and that the Siegel Trading Company did not have any lien against his membership, as provided for in the rules of the Chicago Mercantile Exchange hereinabove set forth; that the defendants, Chicago Mercantile Exchange, Everette B. Harris, William Phelan and Leo Melamed, were aware of the plaintiff's membership as herein set forth for the reason the defendant, William Phelan, acknowledge same and directed the plaintiff, "Ricci", to follow a plan as

outlined in the memorandum hereto attached and made a part hereof as Exhibit "A".

16. It was part of said conspiracy that the defendant, Joseph E. Siegel, individually and the Siegel Trading Company, a corporation, did induce the Chicago Mercantile Exchange through its officers, Everette B. Harris, William Phelan and Leo Melamed, to violate the rules and regulations of the Chicago Mercantile Exchange to deprive the plaintiff of his membership in the Chicago Mercantile Exchange and to deny him the privilege of trading in a "contract market" in interstate commerce, as provided for in the Commodity Exchange Act, as amended, the rules and regulations of the Secretary of Agriculture of the United States Government, all in accordance with 7 U.S.C. Sec. 1-17(a).

17. It was a further part of said conspiracy that the defendants, Everette B. Harris, William Phelan, Leo Melamed, Siegel Trading Company and Joseph E. Siegel to attempt to have the plaintiff, "Ricci", deprived of his membership and privilege of trading on the Chicago Mercantile Exchange by attempting to induce the Helfer Commodities, a Clearing House member of the Chicago Mercantile Exchange, to issue an ante-dated release as of June 13, 1968, to the defendant, Siegel Trading Company, in order to terminate and endanger the right of the plaintiff, "Ricci", as a member of the Chicago Mercantile Exchange to trade on commodities in interstate commerce for himself and others; that the co-conspirators, Everette B. Harris, William Phelan, Leo Melamed, Joseph E. Siegel and the Siegel Trading Company, well knew that the defendants, Everette B. Harris and the Chicago Mercantile Exchange had no authority to seek any attempted release on behalf of the plaintiff, "Ricci", nor did the defendants, Everette B. Harris and the Chicago Mercantile Exchange, have any authority or prerogative to determine to whom such an attempted release could be directed to.

18. In pursuance of said conspiracy and for its purpose to carry out its objects and purposes, that on or about February 11, 1969, the co-conspirators, Everette B. Harris, William Phelan, Leo Melamed, Joseph E. Siegel and the Siegel Trading Company, did in fact cause the Chicago Mercantile Exchange to transfer the membership of the plaintiff, "Ricci", without a hearing or notice to one James F. Reich at a reported sales price of $45,000.00; that the plaintiff, "Ricci", was deprived of his right to act as a member of the Chicago Mercantile Exchange as a floor broker and trader for himself and for others from on or about February 11, 1969, until March 4, 1969; that as a further part of said conspiracy by the defendants, Chicago Mercantile Exchange, Everette B. Harris, William Phelan, Leo Melamed, Joseph E. Siegel and the Siegel Trading Company, to discontinue and remove the plaintiff, "Ricci", as a member of the Chicago Mercantile Exchange and to deprive him of his right to trade on behalf of himself and others in commodities in interstate commerce. The plaintiff, "Ricci", in order to maintain his customers and to expand and increase his business was obliged and forced to purchase a membership in the Chicago Mercantile Exchange as of March 4, 1969, for which he paid a price of $45,000.00 therefor.

19. In furtherance of said conspiracy between the Chicago Mercantile Exchange and Everette B. Harris, the defendants, Joseph E. Siegel and the Siegel Trading Company, induced the defendant, Chicago Mercantile Exchange, to accept a blank authorization to transfer membership that had previously been revoked by the plaintiff, "Ricci", with full knowledge that said membership belonged exclusively to the plaintiff, "Ricci", for the reason that the defendant, Siegel Trading Company, was indebted to the plaintiff for floor brokerage fees from May 19, 1967 thru February of 1969 in the sum of approximately $18,175.00 against which the plaintiff, "Ricci", was indebted to the Siegel Trading Company for the sum of $15,000.00 which was the purchase price of plaintiff's membership in the Chicago Mercantile Exchange; that

the conspiracy between, the Chicago Mercantile Exchange, Everette B. Harris, William Phelan, Leo Melamed, Joseph E. Siegel and the Siegel Trading Company, has been done with full knowledge of the violation by the Chicago Mercantile Exchange of fraudulent financial statements of the defendant, Siegel Trading Company, in that the financial statements of the defendant, Siegel Trading Company, do not reveal or reflect liabilities in excess of $200,000.00 that were partially due to the plaintiff, "Ricci", and others as floor brokers that had filled orders on the Chicago Mercantile Exchange for Siegel Trading Company, all in violation of the rules and regulations of the Chicago Mercantile Exchange and the Commodity Exchange Act, as aforesaid; that the defendant, Chicago Mercantile Exchange, being a "contract market" within the meaning of the Commodity Exchange Act must abide by the rules of the Commodity Exchange Act as well as the enforcement of its own rules relating as to membership, financial structure and policing of its members as set forth in all the rules and regulations of the Commodity Exchange Act and the Chicago Mercantile Exchange.

20. All of the aforesaid acts of the defendants, as co-conspirators, was done maliciously, wilfully, knowingly, unlawfully and without just cause or provocation, with the unlawful and illegal intent, purpose and object of restraining and preventing plaintiff from exercising an essential and necessary part of his lawful trade or business in interstate commerce; preventing the plaintiff from rendering to himself and for his customers in interstate trade or commerce, the services necessary and essential for the continuation of plaintiff's business and for the purpose of unlawfully and illegally eliminating said business of plaintiff's in interstate commerce.

21. All of the aforesaid acts of the defendants were in violation of the provisions of Title 15, U.S.C.A., Sec. 1, etc. and in particular Acts of Congress of July 2, 1890, and October 15, 1914, commonly known as the Sherman Anti-Trust Act, and the Clayton Act, and the

subsequent acts of Congress amendatory and supplemental thereto.

22. As a result of the wrongful acts of the defendants and the co-conspirators, the plaintiff has sustained great loss and damage which has been inflicted upon him by virtue of said conspiracy and the acts of said defendants as co-conspirators done in pursuance thereof; that said defendants and said co-conspirators intended that the plaintiff should be damaged and put to expense and loss of customers, trade and profits as a result of their acts.

23. As a further result of said unlawful acts of the defendants as aforesaid, the plaintiff has been placed in a substantial competitive disadvantage of his business as a trader and broker in dealing in products in interstate commerce by having direct access to the commodity market of the Exchange.

24. That plaintiff's business as a broker had been destroyed as his customers have been diverted by others and he has lost and continues to lose vast amounts of broker's commission; that the beneficial commercial relations between the plaintiff and his customers and other members of the Exchange have been destroyed.

Wherefore, plaintiff asks:

1. That this Court declare the actions of the defendants as aforesaid as unlawful and in violation of the Sherman Act, and that the plaintiff has been injured thereby in his property within the meaning of Sec. 4 of the Clayton Act.

2. That this Court declare that the purported deprivation of the plaintiff of the membership from the Chicago Mercantile Exchange was in violation of Sec. 1 of the Sherman Act and is void and of no force and effect.

3. That as a result of the aforesaid, the plaintiff has sustained damages in the amount of $100,000.00 and is entitled to recover under the Acts of Congress of July 2nd and October 15th of 1914, commonly known

as the Sherman Anti-Trust Act and the Clayton Act three-fold the amount of said damages to wit: $300,000.00 together with reasonable attorneys' fees and costs of this suit as provided by statute.

4. For such other and further relief as to this Court may deem equitable or proper.

COUNT II

25. Plaintiff adopts and realleges paragraphs one thru twenty-four of Count I of this Complaint.

Wherefore, plaintiff asks as follows:

1. That this Court declare that the actions of the defendants, as aforesaid, are intentional, unlawful and tortious interference with advantageous commercial relationships existing between the plaintiff, his customers and other members of the Chicago Mercantile Exchange under the common law of the State of Illinois;

2. That plaintiff recover the amount of damages sustained as the result of defendants unlawful acts, as aforesaid, together with punitive damages in an amount not less than $500,000.00 and the costs of this suit.

3. For such other or further relief as the Court may deem equitable or proper.

COUNT III

Plaintiff complains of the defendants, Chicago Mercantile Exchange, Everette B. Harris, William Phelan, and Leo Melamed, and states as follows:

26. Plaintiff adopts and realleges paragraphs one thru twenty-four of Count I of this complaint.

Wherefore, plaintiff asks:

1. That this Court declare the actions of the defendants, Chicago Mercantile Exchange, Everette B. Harris, William Phelan and Leo Melamed, as unlawful and in violation of the Sherman Act, and that the plaintiff has

been injured thereby in his property within the meaning of Sec. 4 of the Clayton Act.

2. That this Court declare that the purported deprivation of the plaintiff of the membership from the Chicago Mercantile Exchange was in violation of Sec. 1 of the Sherman Act and is void and of no force and effect.

3. That as a result of the aforesaid, the plaintiff has sustained damages in the amount of $100,000.00 and is entitled to recover under the Acts of Congress of July 2nd and October 15th of 1914, commonly known as the Sherman Anti-Trust Act and the Clayton Act three-fold the amount of said damages to wit: $300,000.00 together with reasonable attorneys' fees and costs of this suit as provided by statute.

4. For such other and further relief as to this Court may deem equitable or proper.

COUNT IV

Plaintiff complains of the defendants, Chicago Mercantile Exchange, Everette B. Harris, William Phelan and Leo Melamed, and states as follows:

27. Plaintiff adopts and realleges paragraphs one thru twenty-four of Count I of this complaint.

Wherefore, plaintiff asks as follows:

1. That this Court declare that the actions of the defendants, Chicago Mercantile Exchange, Everette B. Harris, William Phelan and Leo Melamed, are intentional, unlawful and tortious interference with advantageous commercial relationships existing between the plaintiff, his customers and other members of the Chicago Mercantile Exchange under the common law of the State of Illinois.

2. That plaintiff recover the amount of damages sustained as the result of defendants, Chicago Mercantile Exchange, Everette B. Harris, William Phelan and Leo Melamed, unlawful acts, as aforesaid, together with puni-

tive damages in an amount not less than $500,000.00 and the costs of this suit.

3. For such other or further relief as the Court may deem equitable or proper.

Plaintiff complains of the defendants, The Siegel Trading Company, a corporation and Joseph E. Siegel, and states as follows:

28. Plaintiffs adopts and realleges paragraphs one thru twenty-four of Count I of this Complaint.

Wherefore, plaintiff asks:

1. That this Court declare the actions of the defendants, The Siegel Trading Company, a corporation and Joseph E. Siegel, as unlawful and in violation of the Sherman Act, and that the plaintiff has been injured thereby in his property within the meaning of Sec. 4 of the Clayton Act.

2. That this Court declare that the purported deprivation of the plaintiff of the membership from the Chicago Mercantile Exchange was in violation of Sec. 1 of the Sherman Act and is void and of no force and effect.

3. That as a result of the aforesaid, the plaintiff has sustained damages in the amount of $100,000.00 and is entitled to recover under the Acts of Congress of July 2nd and October 15th of 1914, commonly known as the Sherman Anti-Trust Act and the Clayton Act three fold the amount of said damages to wit: $300,000.00 together with reasonable attorneys' fees and costs of this suit as provided by statute.

4. For such other and further relief as to this Court may deem equitable or proper.

COUNT V

Plaintiff complains of the defendants, The Siegel Trading Company, a corporation and Joseph E. Siegel, and states as follows:

28. Plaintiff adopts and realleges paragraphs one thru twenty-four of Count I of this Complaint.

Wherefore, plaintiff asks:

1. That this Court declare the actions of the defendants, The Siegel Trading Company, a corporation and Joseph E. Siegel, as unlawful and in violation of the Sherman Act, and that the plaintiff has been injured thereby in his property within the meaning of §4 of the Clayton Act.

2. That this Court declare that the purported deprivation of the plaintiff of the membership from the Chicago Mercantile Exchange was in violation of §1 of the Sherman Act and is void and of no force and effect.

3. That as a result of the aforesaid, the plaintiff has sustained damages in the amount of $100,000.00 and is entitled to recover under the Acts of Congress of July 2nd and October 15th of 1914, commonly known as the Sherman Anti-Trust Act and the Clayton Act three fold the amount of said damages to wit: $300,000.00 together with reasonable attorneys' fees and costs of this suit as provided by statute.

4. For such other and further relief as to this Court may deem equitable or proper.

COUNT VI

Plaintiff complains of the defendants, The Siegel Trading Company, a corporation and Joseph E. Siegel, and states as follows:

29. Plaintiff adopts and realleges paragraphs one thru twenty-four of Count I of this complaint.

Wherefore, plaintiff asks as follows:

1. That this Court declare that the actions of the defendants, The Siegel Trading Company, a corporation and Joseph E. Siegel, are intentional, unlawful and tortious interference with advantageous commercial relationships existing between the plaintiff, his customers

and other members of the Chicago Mercantile Exchange under the common law of the State of Illinois.

2. That plaintiff recover the amount of damages sustained as the result of defendants, The Siegel Trading Company, a corporation and Joseph E. Siegel, unlawful acts, as aforesaid, together with punitive damages in an amount not less than $500,000.00 and the costs of this suit.

3. For such other or further relief as the Court may deem equitable or proper.

/s/ Harry H. Fortes
/s/ Fred J. Ginsburg
Harry H. Fortes and
Fred J. Ginsburg
Attorneys for Plaintiff
11 South LaSalle Street
Chicago, Illinois 60603
FRanklin 2-5133

EXHIBIT A

1. Submit bill by month

2. Offset $15,000 for membership + 6% interest from date of purchase to date of bill

3. Set forth amount due & owing T.R.

4. Demand return of document dated 10-24-67

IN THE UNITED STATES DISTRICT COURT
• • (Caption No. 69-C-1030) • •

MOTION TO DISMISS
(Filed July 9, 1969)

Now comes defendants, The Siegel Trading Co., Inc., and Joseph E. Siegel by Max & Herman Chill, their attorneys, and move the Court to dismiss Count I, Count II, Count V, and Count VI of the complaint herein for failure to state a claim upon which relief can be granted, and for lack of jurisdiction, on the following grounds:

1. This action does not lie under Sec. 1 of the Sherman Act, 15 U.S.C. Sec. 1 and Sections 4 and 16 of the Clayton Act, 15 U.S.C. Sections 15, 26, for the reason that the complaint does not state facts which constitute a conspiracy in restraint of trade, but merely puts in issue, the question of who was the true owner of the Chicago Mercantile Exchange membership in question.

2. Plaintiff and these defendants are all citizens and residents of the State of Illinois and hence there is no diversity of citizenship in this cause.

Wherefore, defendants, The Siegel Trading Co., Inc. and Joseph E. Siegel pray that this suit be dismissed with costs most wrongfully sustained.

Max and Herman Chill
By /s/ Charles B. Bernstein
Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
• • (Caption No. 69-C-1030) • •

MOTION TO DISMISS FOR LACK OF JURISDICTION OVER THE SUBJECT MATTER
(Filed July 10, 1969)

Defendants Chicago Mercantile Exchange, Everette B. Harris, William Phelan and Leo Melamed move the Court to dismiss this action on the ground that the Court lacks jurisdiction because it appears on the face of the complaint that the alleged claim does not arise under Section 1 of the Act of July 2, 1890, commonly known as the Sherman Act, 15 U.S.C. Sec. 1, as amended, and that no recovery may be had under Sections 4 and 16 of the Act of October 15, 1914, commonly known as the Clayton Act, 15 U.S.C. Sec. 15 and 26, as amended.

/s/ Lee A. Freeman
Lee A. Freeman, Attorney for
Chicago Mercantile Exchange,
Everette B. Harris,
William Phelan and
Leo Melamed

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

Name of Presiding Judge, Honorable James B. Parsons

Cause No. 69C1030 Nov. 25, 1969

Thomas Ricci v. Chicago Mercantile Exch. etal

Ruling on deft's motion to present Memo., Opinion and plaintiff's objcs. thereto.

Motion of defendants to dismiss the complaint, is allowed, and it is so ordered.

/s/ Parsons, J

EXCERPTS FROM DEPOSITION

IN THE UNITED STATES DISTRICT COURT
* * (Caption—No. 69 C 1030) * *

The deposition of Thomas Ricci, called by the defendants for examination pursuant to notice and pursuant to the Rules of Civil Procedure for the United States District Court pertaining to the taking of depositions for the purpose of discovery, taken before JULIUS R. CARTER, C.S.R., a notary public within and for the County of Cook and State of Illinois, at Suite 3700, One North LaSalle Street, Chicago, Illinois, on the 19th day of June, A. D. 1969.

Appearances:

Messrs. Harry H. Fortes and
Fred J. Ginsburg,
for the plaintiff;
Mr. Lee A. Freeman,
for the defendants.

12 * * * (By Mr. Freeman:)

Q. Now, I put the question to you, Mr. Ricci, and I ask you for an answer:

Did you at the time you made application for membership in this Exchange represent to the Exchange
13 that it was your funds that were paying for the membership?

A. This is the way it was: When I filled out the application for membership, I put down on the application that I received a loan from the Siegel Trading Company.

Q. Is that what you said you put down?

A. Yes, this is what I put down. When I was before the membership committee they asked me if these were my funds, and I told them no, they were not.

They said, "Is it your money?" And I said, "No, I received a loan from the Siegel Trading Company."

They told me, they said, "You have to change your answer that these are your funds. We don't care where you got the money, whether you got it from Siegel Trading Company, whether you got it from your father, or where

you got it from. I want you to put 'yes,' that these are your own funds."

They drew a line through the "no," and through the part where it said, "These funds—" that I received a loan from the Siegel Trading Company. The answer was answered "Yes." That these are my own funds. And this is the way it was.

Q. How was the loan evidenced that you said you received?

A. It was right there on the application.

Q. What was the loan?

A. The loan was for the amount of membership.

Q. How much was it?

A. $15,000.00.

Q. Was that what memberships were selling for, then?

A. Yes, sir, it was.

* * *

* * *

(By Mr. Freeman:)

Q. Did you at the same time that you made application also sign a slip authorizing transfer of membership and give it to Joe Siegel?

A. No, sir.

Q. When did you sign such authorization?

A. I don't know the day. It was in October of something, '67, six months after I became a member, I believe.

Q. What were the circumstances of your signing that?

A. Mr. Winograd, who is the secretary-treasurer of Siegel Trading Trading Company, came to me and asked me to sign it, because they didn't have—he said—

Q. What did he say? Tell the truth. You are about to—

Mr. Ginsburg: I object to your remarks.

* * *

* * *

* * * The Witness: I don't remember his exact words.

(By Mr. Freeman:)

Q. What is the substance of what Mr. Winograd—

A. Well, they didn't have any—that I didn't sign any note or anything before, and I don't recall.

Q. Why don't you recall? Well, you were saying—

A. I am very nervous at the moment, that is one reason.

Q. I am sorry. Do you want a cup of coffee?

A. Yes, I think I would like a cup of coffee.

Q. Let's take a recess, and we will get a cup of coffee. I don't want to make you nervous.

(Short recess.)

Q. During the recess, was your memory refreshed with respect to what conversation, substance of the conversation you had with Mr. Winograd?

A. Yes.

Q. Tell us about it.

A. He said that— he asked me to sign it; I read it. The reason he asked me to sign it was that he said that the Siegel Trading Company didn't have any protection for the money that they loaned me for my membership at the Mercantile Exchange. And I knew that I owed Siegel $15,000.00 for the membership at the time, and I signed it.

* * *

* * *

Q. Do you know what the rules of the Exchange are with respect to whether or not a broker can be qualified by more than one clearing house?

A. He can—to my knowledge, he can only be qualified by one clearing house.

Q. And that he has to have a release from the clearing house that qualifies him before he can be qualified by another house?

A. Yes, sir.

Q. Then, when Siegel Trading Company was suspended, did you get a release from Siegel Trading Company so that you could be qualified by Helfer?

A. Yes, sir, I was, and it was signed by Alvin Winograd.

Q. Yes, of course, no question about it.

Did you ever get a release from Helfer after Siegel became reinstated as a clearing member?

A. No, sir.

Q. Did you act as a broker for Siegel, the clearing member, subsequent to the time of reinstatement?

A. You mean did I fill orders for Siegel Trading Company?

Q. Yes.

A. Yes, I filled orders for Siegel, I filled orders for—

* * *

36-60 * * *

61 * * * (By Mr. Freeman:)

Q. Did you receive a transfer of membership, of your father's membership on or about March 4, 1969?

A. Yes, I did.

Q. And was that transfer of membership made simultaneously with the transfer of membership from you through Siegel Trading Company to James F. Reich on the same day?

A. From me?

Q. Yes. Execution of that authorization to transfer

62 what you said was evidence of an indebtedness. Let me put it this way:

On March 4, did you receive a transfer of membership from your father approved by the Exchange, and did you at that time lose the membership that you had from Siegel Trading?

A. Yes.

* * *

63-69 * * *

70 * * * Mr. Freeman: Now, Mr. Ricci, I understand you.

Now, with respect to your commissions, whatever the situation is, isn't that a controversy between you and Joseph Siegel, and only between you and Joseph Siegel?

A. The commissions?

Q. Yes.

A. I would say no because Mr. Siegel said that he did not owe me any money.

Q. And you said he owed you money?
A. Yes.
Q. Then, isn't that a dispute between you and Joseph Siegel?
71 A. Oh, it is a dispute between he and I, yes, it is.
Q. Did you ever bring that to the Board for the purpose of securing arbitration?
A. Of course.
Q. When?
A. The same day that I went there for my membership. And if you will talk to the Board of Governors, they will tell you that the way I was supposed to go to arbitration was a twofold agreement.
Q. That is what you said before. Why did you withdraw from the arbitration?
A. Like I said, it was a twofold agreement. I understand that Mr. Siegel came up and finally said that he owed me the $18,000.00. Therefore, we didn't have to go to arbitration.

* * *

72-79 * * *
80 * * * Q. Tell me this: Was there any interruption in your privilege of membership? Was there a single day when you were not a member of the Exchange during the period from January, 1969 to April, 1969?
A. No.
Q. So at all times you were a member of the Exchange, and you have been a member of the Exchange since May, 1967, whichever date it is?
A. Yes.

* * *

EXHIBITS TO DEFENDANTS' DEPOSITION OF THOMAS RICCI

EXHIBIT No. 7
February 24, 1969

Mr. Thomas C. Ricci
THE SIEGEL TRADING COMPANY
100 North LaSalle Street
Chicago, Illinois 60602
Dear Mr. Ricci:

IN RE: Membership of Thomas C. Ricci
You are hereby requested to submit the dispute between The Siegel Trading Company and Thomas C. Ricci over the ownership of the above membership to the Arbitration Committee. Enclosed is a copy of the Chicago Mercantile Exchange "Arbitration Agreement" which you should execute and return to me as soon as possible. Please submit the arbitration fee as set forth in Chicago Mercantile Exchange Rule 512 when you return the Arbitration Agreement.

The Arbitration Committee has scheduled the matter for Wednesday, March 5, 1969, at 2:15 P. M. in the Committee Room in the Exchange Building. You may be represented by counsel.

Sincerely yours,
Everette B. Harris
President

EBH:jh
Enc.

EXHIBIT No. 6

CHICAGO MERCANTILE EXCHANGE

ARBITRATION AGREEMENT

In re: The Siegel Trading Co. v. Thomas C. Ricci
It is hereby mutually agreed between the parties whose signatures are hereto attached that they will abide by the

rules of the Chicago Mercantile Exchange in the matter which they are preparing to submit to the Chicago Mercantile Exchange for arbitration.

/s/ J. C. Siegel

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EXHIBIT No. 8

February 25, 1969

Mr. Thomas C. Ricci
THE SIEGEL TRADING COMPANY
100 North LaSalle Street
Chicago, Illinois 60602

Dear Mr. Ricci:

Mr. William M. Phelan from the Department of Audits and Investigations has reported to me that your counsel, Mr. Harry Fortes, has indicated an unwillingness to submit to arbitration the dispute between yourself and The Siegel Trading Company with respect to your membership. I wrote to you on February 24, 1969, under the assumption that both parties had agreed to arbitration and, accordingly, we had scheduled a hearing.

In view of the attitude of Mr. Fortes in rejecting arbitration as a means of settling such dispute, my letter of February 24, 1969, should be disregarded.

Further, if we do not hear from you to the contrary by Friday, February 28, 1969, consider the arbitration cancelled and the Exchange will proceed in accordance with its rules.

Sincerely yours,
Everette B. Harris
President

EBH:jh

EXHIBIT No. 2

HARRY H. FORTES
Attorney at law

11 South LaSalle St.
Chicago, Illinois 60603
FR 2-5133

February 27, 1969

Michael Weinberg Jr., Secretary,
The Chicago Mercantile Exchange,
110 N. Franklin Street,
Chicago, Illinois.

In Re: Thomas Ricci

Dear Mr. Weinberg:

In accordance with rule 500 Mr. Thomas Ricci has been directed by Everette B. Harris to submit the matter of the ownership of his membership to arbitration. It is my interpretation that this matter is not within the scope defined as being arbitrative. To coerce Mr. Ricci to submit is a direct denegation of several of our rules.

There are also several other germane matters incidental to this situation. On behalf of Mr. Ricci I would appreciate the opportunity of presenting an appeal to the Board of Governors, as made and provided for in rule 500.

Sincerely yours,
/s/ Harry H. Fortes
Harry H. Fortes

HHF:ds

EXHIBIT No. 3

Telephone RAndolph 6-6490
CHICAGO MERCANTILE EXCHANGE
110 No. Franklin Street
Chicago 60606
Executive Offices

February 28, 1969

Mr. Harry Fortes
Attorney at Law
11 South LaSalle Street
Chicago, Illinois 60603

Dear Mr. Fortes:

Mr. Michael Weinberg submitted to me a copy of your letter to him dated February 27, wherein you state that I directed Mr. Thomas Ricci to submit to arbitration and you request appearance before the Board.

In this regard please be advised that the matter of arbitration was agreed to between the parties in question and not at my direction. Additionally, after receipt of your communication that you do not wish your client to submit to arbitration, the Exchange notified your client that the arbitration hearing had been cancelled.

Accordingly, I do not feel it will be necessary for you to appear before the Board in this regard.

Very truly yours,
Everette B. Harris
President

cc: Mr. Thomas Ricci

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1970 — JANUARY SESSION, 1971

No. 18222
THOMAS RICCI,
Plaintiff-Appellant,
v.
CHICAGO MERCANTILE EXCHANGE, an Illinois not-for-profit corporation, EVERETTE B. HARRIS, WILLIAM PHELAN, LEO MELAMED, THE SIEGEL TRADING COMPANY, a corporation, and JOSEPH E. SIEGEL,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

JUNE 17, 1971

Before HASTINGS, *Senior Circuit Judge,* and KILEY and KERNER, *Circuit Judges.*

HASTINGS, *Senior Circuit Judge.* Plaintiff Ricci brought this action under sections 4 and 16 of the Clayton Act, Title 15, U.S.C.A. §§ 15[1] and 26,[2] seeking injunctive relief

[1] Title 15, U.S.C.A. § 15 provides:
"§ 15. Suits by persons injured; amount of recovery
"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall re-

and treble damages. The complaint charged defendants Chicago Mercantile Exchange, its president, Everette B. Harris, its vice-president, William Phelan, its board chairman, Leo Melamed, and Siegel Trading Company and its president, Joseph Siegel with violations of section 1 of the Sherman Act, Title 15, U.S.C.A. § 1[3] and tortious interference with commercial relationships. Siegel Trading Company and Siegel[4] moved to dismiss the complaint for failure to state a claim upon which relief could be granted and for want of jurisdiction. In a separate motion to dismiss, the Exchange defendants argued the complaint failed to state a cause of action under section 1 of the Sherman Act. From an order granting defendants' motions to dismiss, plaintiff appeals.

(Footnote Continued)

cover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

[2] Title 15, U.S.C.A. § 26 provides, *inter alia*:

"§ 26. Injunctive relief for private parties; exception

"Any person • • • shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the anti-trust laws • • •."

[3] Title 15, U.S.C.A. § 1 provides, *inter alia*:

"§ 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States • • • is declared to be illegal • • •."

[4] Siegel Trading Company will be referred to as "Siegel." Likewise, the Chicago Mercantile Exchange and its officers will be referred to as the "Exchange" or the "Exchange defendants."

Count I of appellant's six-count complaint alleged, in substance, that he purchased a membership in the Chicago Mercantile Exchange and became duly qualified to trade in commodities and commodity futures pursuant to the rules of the Exchange and the Commodities Exchange Authority. On February 11, 1969, Siegel induced the Exchange and its officers to transfer appellant's membership to James F. Reich, without hearing or notice, utilizing a previously revoked blank authorization to transfer membership. Such action was allegedly in violation of the rules and regulations of the Exchange and the Commodity Exchange Act and was done in pursuance of an unlawful conspiracy with the intent and for the purpose of restraining appellant from conducting his lawful business.[8] As a result of such transfer, appellant was excluded from trading on the Exchange from February 11, 1969 until March 4, 1969 when he purchased another membership for $45,000.

Counts III and V of the complaint are directed against the Exchange and the individual defendants and reallege the allegations of Count I with respect to violation of the Sherman Act. Counts II, IV and VI charge tortious interference with advantageous commercial relationships and, since all parties are residents of Illinois, will necessarily fall for want of jurisdiction if the Sherman Act allegations are not sustained.

The Exchange defendants claim that the trial court, in ruling on the motions to dismiss, admitted evidence other than that stated in the complaint and thereby converted them into motions for summary judgment. See, Fed. R.Civ. P. 12(b), 56. If this were true, it would allow

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[8] Plaintiff also alleges that the conspirators attempted to induce a "Clearing Member" of the Exchange to issue an antedated release of its authorization of Ricci to trade to Siegel and that the Exchange knowingly failed to enforce its own rules relating to financial reporting. No specific damage is assigned to these allegations.

this court to examine deposition testimony which appellees contend entirely disposes of the case. The short answer is that the transcript of the hearing on the motion to take depositions demonstrates that the court below was considering only the allegations in the complaint when it ruled on the motions to dismiss.

Since this is an appeal from an order granting Rule 12(b), Fed. R.Civ. P., motions to dismiss, we must accept appellant's foregoing allegations of fact as true. *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172, 174-75 (1965); *Duzynski* v. *Nosal*, 7 Cir., 324 F. 2d 924 (1963).

I

Appellant first contends that, absent any justification to be derived from the Chicago Mercantile Exchange's status as a board of trade and a designated "contract market" under the Commodities Exchange Act, Title 7, U.S.C.A. § 1 *et seq.*, the allegations of the complaint are sufficient to allege a group boycott, a *per se* violation of section 1 of the Sherman Act.

Relying on *Scanlon* v. *Anheuser Busch, Inc.*, 9 Cir., 388 F. 2d 918 (1968), cert. denied, 391 U.S. 916 (1968) and *Ace Beer Distributors, Inc.* v. *Kohn, Inc.*, 6 Cir., 318 F. 2d 283 (1963), cert. denied, 375 U.S. 922 (1963), the Siegel defendants argue that the facts allegedly merely amount to the substitution of one competitor for another with no resulting public injury and are, therefore, not within the purview of the antitrust acts.

Scanlon, supra, and *Ace Beer, supra,* are inapplicable to the case at bar. Each concerned the cancellation of individual exclusive beer distributing contracts with the immediate substitution of other distributors. The relevant markets were competitive and the courts held that no unreasonable restraint of trade resulted from the refusals to deal since existing competition was not diminished and the cancellation was not an unusual business procedure. See, *Ace Beer, supra* at 287.

Appellant has alleged his exclusion from the Chicago Mercantile Exchange, a monopolistic market, was in violation of its own rules and regulations. Such exclusion is alleged to be a part of a conspiracy to intentionally injure his business. In *Gamco, Inc.* v. *Providence Fruit & Produce Bldg.*, 1 Cir., 194 F.2d 484 (1952), cert. denied, 344 U.S. 817 (1952), the court was confronted with the exclusion of a trader from a produce building where the sales of fresh fruits and vegetables occurred. The board that managed the building refused to renew the trader's lease after its expiration. The court in finding violations of sections 1 and 2 of the Sherman Act said:

> "[T]he latent monopolist must justify the exclusion of a competitor from a market which he controls. Where, as here, a business group understandably susceptible to the temptations of exploiting its natural advantage against competitors prohibits one previously acceptable from hawking his wares beside them any longer at the very moment of his affiliation with a potentially lower priced outsider, they may be called upon for a necessary explanation. The conjunction of power and motive to exclude with an exclusion not immediately and patently justified by reasonable business requirements establishes a prima facie case of the purpose to monopolize." *Id.* at 488.

Accepting, as we must, appellant's allegations as to the reasons and manner in which he was excluded, there is no justification for the actions of the Exchange and the individual defendants. The transfer of his membership in violation of the rules of the Exchange and pursuant to a conspiracy to intentionally injure his business would constitute a group boycott, *per se* actionable under the Sherman Act.

The absence of an allegation of public injury is not fatal to the maintenance of an action where a *per se* violation is alleged. *Radiant Burners, Inc.* v. *Peoples Gas,*

Light and Coke Co., 364 U.S. 656 (1961); *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *Switzer Brothers* v. *Locklin*, 7 Cir., 297 F. 2d 39 (1961).

Likewise, where the defendants enjoy the power to deny potential competitors access to the market, the absence of competitive change in the relevant market is not fatal to the cause of action. *Gamco, Inc., supra* at 487.

Finally, this is not a case, as appellees contend, where appellant has used traditional antitrust language to transform an essentially state cause of action into a federal antitrust claim. *Compare, Norville* v. *Globe Oil & Refining Co.*, 7 Cir., 303 F. 2d 281 (1962); *Parmelee Transportation Company* v. *Keeshin*, 7 Cir., 292 F. 2d 794 (1961).

In view of the foregoing, we conclude that, absent any justification from the Exchange's status as a board of trade and a designated "contract market," the complaint is sufficient to allege a group boycott, a *per se* violation of section 1 of the Sherman Act.

II

Relying primarily on *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963), appellant asserts that no justification can be derived either from the Commodities Exchange Act or from the Exchange's status as a board of trade for the actions herein alleged. Consequently, he claims a cause of action under section 1 of the Sherman Act has been stated.

In *Silver, supra*, member firms of the New York Stock Exchange were ordered by the Exchange to terminate private telephone and tickertape connections to Silver's over-the-counter brokerage firms. The Court, observing that the concerted cut-off by the Exchange and its members had deprived Silver of an asset important to his ability to compete as a broker-dealer, said that such conduct would have been a *per se* violation of the Sherman Act "absent any

justification derived from the policy of another statute or otherwise." *Id.* at 348-49. However, because of the existence of the mandate of self-regulation present in the Securities Exchange Act, the Court sought to "reconcile pursuit of the antitrust aim of eliminating restraints on competition with the effective operation of a public policy contemplating that securities exchanges will engage in self-regulation which may well have anticompetitive effects in general and in specific applications." *Id.* at 349.

The Court concluded that under the circumstances of the case, it did not have to complete the accommodation between the acts since the Exchange did not reach the threshold of justification under the statute and had plainly exceeded the scope of its authority to engage in self-regulation by not informing Silver of the charges underlying the decision to terminate the connections and by not providing an appropriate opportunity to explain or refute such charges despite prompt and repeated requests therefor. *Id.* at 361, 365.

Appellant here contends that the Exchange was not justified in excluding him from trading because nothing in the statutory scheme allows the Exchange to discipline brokers by excluding them from trading. Even if there were such statutory authorization, here he was afforded neither hearing nor notice and, thus, he claims the Exchange did not reach the threshold of justification. Assuming these contentions to be true, they do not dispose of this case.

The Chicago Mercantile Exchange is a "contract market" designated by the Secretary of Agriculture to conduct future trading in commodities pursuant to the Commodity Exchange Act, as amended, Title 7, U.S.C.A. § 1, *et seq.* As a condition of such designation, it must fulfill certain statutory requirements including the enactment and enforcement of bylaws, rules and regulations

which relate to "trading requirements"[6] and which provide "minimum financial standards and related reporting requirements"[7] for members of such markets.

Failure to enforce these bylaws, rules and regulations may result in suspension or revocation of the contract market designation[8] as well as cease and desist proceedings with attendant misdemeanor penalties for failure to com-

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[6] Title 7, U.S.C.A. § 7a provides, *inter alia*:

"§ 7a. Duties of contract markets

Each contract market shall—

* * *

"(8) enforce all bylaws, rules, regulations, and resolutions, made or issued by it or by the governing board thereof or any committee, which relate * * * to other trading requirements, and which have not been disapproved by the Secretary of Agriculture * * *."

[7] Title 7, U.S.C.A. § 7a provides, *inter alia*:

"§ 7a. Duties of contract markets

Each contract market shall—

* * *

"(9) enforce all bylaws, rules, regulations, and resolutions made or issued by it or by the governing board thereof or by any committee, which provide minimum financial standards and related reporting requirements for * * * members of such contract market * * *."

[8] Title 7, U.S.C.A. § 7b provides:

"§ 7b. Suspension or revocation of designation as 'contract market'

"The failure or refusal of any board of trade to comply with any of the provisions of this chapter, or any of the rules, regulations, or orders of the Secretary of Agriculture or the commission thereunder, shall be cause for suspending for a period not to exceed six months or revoking the designation of such board of trade as a 'contract market' in accordance with the procedure and subject to the judicial review provided in section 8 of this title."

ply.[9] Anyone who acts singly or in concert with another to bring about a violation of rules and regulations issued pursuant to the Act is liable as a principal for such violations and may be subjected to loss of trading privileges on contract markets, as well as cease and desist proceedings with attendant penalties.[10]

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[9] Title 7, U.S.C.A. § 13a provides, *inter alia*:

"§ 13a. Nonenforcement of rules of government or other violations, cease and desist orders against contract markets; punishment; misdemeanor; separate offenses

"If any contract market is not enforcing or has not enforced its rules of government made a condition of its designation as set forth in section 7 of this title, or if any contract market, or any director, officer, agent, or employee of any contract market otherwise is violating or has violated any of the provisions of this chapter • • • the commission may, upon notice and hearing and subject to appeal as in other cases provided for in paragraph (a) of section 8 of this title, make and enter an order directing that such contract market, director, officer, agent, or employee shall cease and desist from such violation, [and upon failure or refusal to comply] shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than $500 nor more than $10,000 or imprisoned for not less than six months nor more than one year, or both. • • •"

[10] Title 7, U.S.C.A. § 13c(a) provides:

"§ 13c. Responsibility as principal; • • •

"(a) Any person who commits, or who willfully aids, abets, counsels, commands, induces, or procures the commission of, a violation of any of the provisions of this chapter, • • • or who acts in combination or concert with any other person in any such violation, or who willfully causes an act to be done or omitted which if directly performed or omitted by him or another would be a violation of this chapter • • • may be held responsible in administrative proceedings under this chapter for such violation as a principal."

The facts alleged by appellant to support his antitrust charge are either violations or induced violations of Exchange rules, promulgated pursuant to the Act, which relate to "trading requirements" and financial reporting requirements.[11] As such, they could have been examined by the Commodity Exchange Commission or the Secretary of Agriculture.[12]

Thus, we are *not* confronted with the problem in *Silver* wherein there was "nothing built into the regulatory scheme which performs the antitrust function of insuring that an exchange will not in some cases apply its rules so as to do injury to competition which cannot be justified as furthering legitimate self-regulative ends." *Id.* at 358 Rather, the maintenance of a private treble-damage suit in the instant case presents the "problem of conflict or co-extensiveness of coverage with the agency's regulatory power" not considered in *Silver. Id.* at 358.

Chief Judge Swygert, in his concurring opinion to *Thill Securities Corp.* v. *New York Stock Exchange,* 7 Cir., 433 F.2d 264 (1970), cert. denied, 39 U.S.L.W. 3424 (U.S. Mar. 30, 1971), suggested that the district court, on remand, consider this problem of coextensiveness of coverage by de-

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[11] Membership in a contract market is a prerequisite to lawful trading in commodities futures. Title 7, U.S.C.A. § 6. Therefore, Rule 307, allegedly violated in the transfer of appellant's membership, and Rule 322, allegedly violated in the attempt to cancel appellant's authorization to trade, both relate to "trading requirements." The other alleged violation was the failure to enforce financial reporting rules.

[12] The Commission has jurisdiction over alleged violations by the Exchange and its officers. It is composed of the Secretary of Agriculture, the Secretary of Commerce and the Attorney General or their respective designees. The Secretary of Agriculture may decide to exclude members of contract markets from trading.

termining whether the Securities Exchange Commission possessed primary jurisdiction to judge the New York Stock Exchange's allegedly anticompetitive antirebate rule. *Id.* at 276. The resolution of this issue depended, in part, on the consideration of the following factors: (1) the SEC's power to weigh antitrust policy in fulfilling its duty of review of Exchange self-regulation; (2) the ability of an aggrieved party to initiate SEC review; (3) the extent that SEC expertise would be useful in resolving the question of whether the antirebate rule was necessary to make the Securities Exchange Act work; and (4) the possibility of achieving the aims of the Sherman Act without subjecting exchanges to treble damage suits. *Id.* at 277.

Applying these criteria to the instant case, we think it appropriate for the invocation of the doctrine of primary jurisdiction. There exists no express or implied exemption in the Commodity Exchange Act that would prevent the Secretary of Agriculture of the Commodity Exchange Commission from taking into account antitrust principles in their deliberations pursuant to the Act. Judge Leventhal, concurring in *Cities of Statesville* v. *AEC*, D.C. Cir., ... F. 2d ....., (Slip opinion No. 21,706, Dec. 5, 1969) (*en banc*), observed:

> "It is a fair synthesis of the cases [of the Supreme Court and of the D.C. Circuit over the last 25 years] that a statute providing for licensing or other regulation is presumed to permit consideration of antitrust principles, with the harmonizing approach [applied to conflicts between antitrust policies and the agency's other regulatory objectives] • • • unless a contrary intent appears expressly or by necessary implication." (Quotation appears in *Hale* v. *F.C.C.*, D.C. Cir., 425 F. 2d 556, 561 (1970) (concurring opinion)).

Appellant could have applied for the institution of proceedings against the defendants before the Commission and/or the Secretary of Agriculture on the facts alleged

in this case.[13] He could have thereafter petitioned for intervention in any proceedings initiated pursuant to his application.[14] If indeed the allegedly anticompetitive transfer of membership were in violation of Exchange rules, the Commission could have prevented it.

Moreover, the questions here involved are precisely the ones that the Commission and the Secretary are to resolve in fulfilling their watchdog function over the Exchange and its members.[15] The allowance of a private treble

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[13] Title 17, C.F.R. §§ 0.3 and 0.53 provide that "any interested person having any information of any violation of the act" may file an application requesting the institution of proceedings before the Secretary or the Commission, respectively.

[14] Title 17, C.F.R. §§ 0.8, 0.58.

[15] In *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296 (1963), the Court dismissed an antitrust action against defendant carriers who had allegedly agreed not to parallel each other's routes. The Civil Aeronautics Board was vested with broad jurisdiction over the air carrier. The Court reasoned at 305:

> "Limitation of routes and divisions of territories and the relation of common carriers to air carriers are basic in this regulatory scheme. The acts charged in this civil suit as antitrust violations are precise ingredients of the Board's authority in granting, qualifying, or denying certificates to air carriers, in modifying, suspending, or revoking them, and in allowing or disallowing affiliations between common carriers and air carriers."

Although the overall regulatory scheme in the instant case is less pervasive than the scheme in *Pan American*, the specific allegations relate directly to the Commission's and the Secretary's power to designate contract markets and allow the trading in futures by individuals. Such power is no less basic to the regulatory scheme than it was in *Pan American*. Also, *compare Far East Conference*

damage antitrust suit in this case prior to the attempted institution of actions before the Commission or the Secretary would discourage "interested persons" from helping the agency fulfill its regulatory function of insuring that contract markets enforce their own rules and bylaws.

Additionally, there is a potential repugnance between a decision of the Commodity Exchange Commission and the award of treble damages in an antitrust action. The 1968 amendments to the Commodity Exchange Act provide the Commission and the Secretary of Agriculture with the discretion to refuse to report "minor violations" of the Act for prosecution "whenever it appears that the public interest does not require such action."[16] The award of damages that are essentially punitive in nature[17] could conflict with a decision by the Commission in the "public

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[15] (Continued)
v. *United States*, 342 U.S. 570 (1952); *United States Nav. Co.* v. *Cunard S.S. Co.*, 284 U.S. 474 (1932) *with California* v. *F.P.C.*, 369 U.S. 482 (1962); *United States* v. *Borden Co.*, 308 U.S. 188 (1939), for ample illustration of Chief Judge Swygert's observation in *Thill, supra* at 277, that cases on primary jurisdiction provide no clear resolution to the issue.

[16] Title 7, U.S.C.A. § 13c(b) provides:
"§ 13c. • • • minor violations
(b) Nothing in this chapter shall be construed as requiring the Secretary of Agriculture or the commission to report minor violations of this chapter for prosecution, whenever it appears that the public interest does not require such action."

[17] As was said in *Commissioner of Internal Revenue* v. *Obear-Nester Glass Co.*, 7 Cir., 217 F.2d 56, 61 (1954), "We might further say that the principal purpose of treble damages seems to be punishment which will deter the violator and others from future illegal acts."

interest" that the punitive steps allowable under the Act should not be taken.[18]

We hold, therefore, that before a private treble damage action for antitrust violations may be brought against these defendants charging violation of the rules promulgated as a condition to a contract market designation, the Commodity Exchange Commission and/or the Secretary of Agriculture must have the first opportunity to secure the fulfillment of the statutory duties imposed upon exchanges and their members. The correct remedy in such a case where there is the possibility of a judicial remedy that cannot be granted by the administrative agency is to remand the case to the district court with directions to stay the proceedings until the agency has acted.[19]

Accordingly, we reverse and remand this action to the district court with directions to stay the proceedings until such time as the Commodity Exchange Commission and/or the Secretary of Agriculture may act upon it.

REVERSED AND REMANDED WITH DIRECTIONS

KERNER, *Circuit Judge,* concurring in part and dissenting in part. While I agree that the complaint states a cause of action under the antitrust laws, I do not believe that a remand of this case to the Commission is proper.

Appellant alleges, *inter alia,* that the defendant, Chicago Mercantile Exchange, knowingly conspired with defen-

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[18] We express no opinion on any antitrust immunity that might result from action or inaction taken by the Commission or the Secretary of Agriculture in this case. The complicated issues of reconciliation of the Commodities Exchange Act and the Sherman Act that would be presented will require the benefit of brief and argument before any determination could be attempted.

[19] *Carnation Co.* v. *Pacific Westbound Conference,* 383 U.S. 213, 222-223 (1966); *Pan American World Airways, Inc.* v. *United States, supra* at 313, n. 19.

dant, Siegel Trading Company, to prevent him from continuing as a member of the Exchange and, therefore, from transacting his business. Other allegations in the complaint disclose that incidental to proof of appellant's antitrust claim is the proving of a transference of his membership by the Exchange to James E. Reich. Since this transference allegedly would violate Exchange rules, and thereby the Commodity Exchange Act, if not pursuant to a valid authorization, the majority reasons that Ricci must first proceed before either the Secretary of Agriculture or the Commission.

It may be that Ricci could have proceeded before the Commission. However, it does not follow that Ricci *must* proceed before the Commission. The doctrine of primary jurisdiction does not require courts to stay their hand in all controversies which involve factual disputes arguably within the jurisdiction of an administrative agency. Rather the doctrine holds "that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over." *Far East Conference* v. *United States*, 342 U.S. 570, 574 (1952). The underlying factual questions in the case at bar involve neither unconventional facts nor administrative discretion.[1] Whether Ricci executed a valid authorization binding on him at the time of transfer is a question which a district court is as competent to assess as a commission composed of the Secretary of Agriculture, the Secretary of Commerce and the Attorney General. And, since Congress has made the enforcement of contract market rules mandatory (7 U.S.C. §7a(9)), no question of administrative discretion could arise.

Thill Securities Corp. v. *New York Stock Exchange*, 433 F. 2d 264 (7th Cir. 1970), *cert. denied* 39 U.S. L.W. 3424,

[1] The Commission does have discretion to refrain from reporting minor violations of its cease and desist orders for prosecution. See discussion *infra*.

heavily relied upon in the majority opinion, presents a much stronger case for the invocation of primary jurisdiction; yet, two of the judges do not mention the doctrine and the third merely suggests the applicability of the doctrine to the district court.

In *Thill,* a licensed securities dealer brought a class action against the New York Stock Exchange charging an unreasonable restraint of trade and an unlawful monopoly of the securities market in violation of the Sherman Antitrust Act[2] and the Clayton Act.[3] The suit was founded on the Exchange's "anti-rebate rule" which prohibits a member from sharing a commission with a non-member even though the non-member originally received the customer's order. The Exchange contended that the "anti-rebate rule" was within the scope of its authorized self-regulatory powers and that the Securities and Exchange Commission was exercising its statutory power of review which explicitly includes the fixing of reasonable rates of commission.[4] Surely, primary jurisdiction was a more appropriate disposition in *Thill* than it is here. *Thill* was (1) a direct antitrust attack on an exchange rule (2) which involved unconventional facts and (3) statutorily declared administrative discretion.

In addition, Judge Pell noted in his separate opinion "that the very matter in issue is now under consideration by the S.E.C. which on May 28, 1968, announced investigation and public hearings on rate structure matter including economic access to the Exchange market by non-member broker-dealers." (*Supra,* at 278.) Despite this aspect, Judge Pell would have remanded to the district court those antitrust questions which related to the alleged Exchange practice of favoring certain non-members. (*Supra,* at 278.) While Judge Pell dissented from that part of the majority opinion in *Thill* which remanded plaintiff's direct challenge of the "anti-rebate rule" to the district court, he did not

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[2] Sherman Antitrust Act §§1-2, 15 U.S.C. §§1-2 (1964).
[3] Clayton Act §4, 15 U.S.C. §15 (1964).
[4] 15 U.S.C. §78(s)(b)(9).

do so on the basis of primary jurisdiction. Rather, he felt that "the 'fixing of reasonable rates of commission . . . and other charges' as provided for by §19(b) (9) of the Securities Exchange Act of 1934 (15 U.S.C. §78(s) (b) (9)) necessarily includes as an ancillary power the prohibition of rebates." (*Supra*, at 277.) This is a decision on the merits of the anti-rebate rule" and, therefore, not relevant to the question of where litigants must seek their remedy. Hence, neither Judge Campbell nor Judge Pell, a majority of the panel in *Thill*, reached a result consistent with the result reached by the majority today.[5] In fact, the opinions of Judges Pell and Campbell appear to be clear authority against the majority's disposition of the case at bar.

The criteria enumerated by Chief Judge Swygert in his concurring opinion would dictate a remand to the district court in this case.

(1) The SEC's power to weigh antitrust policy in fulfilling its duty of review of Exchange self-regulation.

I assume the majority opinion intends the Commission (Secretaries of Agriculture and Commerce and the Attorney General) to fully decide the issues in this case. Perhaps the very incongruence of these officials deciding difficult antitrust questions is enough to suggest that Congress did not legislate such a result.[6] However, the resolution

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[5] Evidently, Judge Pell believed the New York Stock Exchange is exempt from suits which are direct challenges to its rules. Since Judge Pell concurred in that part of Judge Campbell's opinion which remanded the remaining issues to the district court, he must have concluded that primary jurisdiction was inappropriate.

[6] I merely observe that antitrust law is not within the peculiar province of the Secretaries of Agriculture and Commerce. Of course, quite the opposite is true of the Attorney General who is the chief enforcement officer of the antitrust laws and who could possibly be placed in an inconsistent position in having to judge those suits.

of this question need not rest on such grounds. Congress has strictly limited the jurisdiction of the Secretary of Agriculture and the Commission to violations "of the provisions of this chapter." (See e.g., Title 7, U.S.C. §13a.) This chapter means the "Commodity Exchange Act" (Title 7, U.S.C. §1) and not the "Sherman Act," which is found at 15 U.S.C. §1.

Furthermore, there is no provision in the Commodity Exchange Act which suggests that the Commission should regulate these types of competitive factors in contract markets. This is in contrast with SEC statutory authority to review "reasonable rates of commission" which arguably includes such factors. Yet Judge Swygert did not believe that this statutory granted power of review in the SEC meant, *ipso facto*, that the SEC had the power to consider these factors.[7] Instead, Judge Swygert suggested that the district court consider the question. This careful approach by Judge Swygert is not adopted by the majority although Commission authority to consider antitrust law is, at the least, arguable.

(2) The ability of an aggrieved party to initiate SEC review.

It is reasonably clear that appellant could have applied for the institution of proceedings before the Commission and/or the Secretary of Agriculture and thereafter petitioned for intervention. By regulation, intervention is permitted[8] upon a showing of (a) the petitioner's relation-

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[7] "Cases concerning primary jurisdiction of other administrative agencies to consider antitrust matters do not provide clear guidance for resolution of this question. Compare, *Pan American World Airlines, Inc.* v. *United States*, 371 U.S. 296, 83 S. Ct. 476, 9 L. Ed. 2d 325 (1963); *California* v. *F.P.C.*, 369 U.S. 482, 82 S. Ct. 901, 8 L. Ed. 2d 54 (1962)." (Concurring opinion of Chief Judge Swygert at p. 277.)

[8] Title 17, C.F.R. §0.8, 0.58.

ship to the matters involved in the proceeding; (b) the nature of the material he intends to present in evidence; (c) the nature of the argument he intends to make; and (d) any other reason he should be allowed to intervene.

These factors indicate that both the Commission and the Secretary of Agriculture possess the power to exclude claimants based on the nature of their claims. Since institution of proceedings is permitted only when there is reason to believe there has been a violation,[9] Ricci might be prevented from asserting his antitrust action before the Commission. Ricci would then return to the district court on his antitrust claim, needlessly multiplying the number of tribunals involved in these proceedings. Of course, this question could be answered, as it was in *Thill*, by a remand to the district court for the taking of evidence.

(3) The extent that SEC expertise would be useful in resolving the question of whether the anti-rebate rule was necessary to make the Securities Exchange Act work.[10]

Seemingly, the relevance of this factor is extremely limited in this case. Ricci has alleged and must prove facts which show an unlawful conspiracy between the Exchange and Siegel Trading Company. A good faith but erroneous decision by the Exchange would not be a violation of the Sherman Act. The power to decide membership requirements implies the power to make good faith but erroneous decisions. Such power is needed to make the Exchange Act work. *Silver* v. *N.Y.S.E.*, 373 U.S. 341, 357. Since Ricci did not allege that a good faith decision by the Ex-

[9] Title 17, C.F.R. §0.3, 0.53. Thus, Ricci may be limited to proof of a Rules violation.

[10] This assumes that the Secretary and/or the Commission have the power to consider antitrust claims. Since the question of primary jurisdiction was neither briefed nor argued orally, we are somewhat inhibited in our analysis.

change to transfer his membership was a violation of the antitrust laws, the question under (3) is whether it is necessary to make the Act work for the Exchange to possess power to determine its membership if these determinations are motivated by otherwise unlawful intent. This is traditional "rule of reason" inquiry which the Court in *Silver* described as "flexible enough to permit the Exchange sufficient breathing space. . . ." (*Supra* at 360.) Whether the Exchange should be insulated from this type of antitrust liability will be considered in the following section. All that remains to be mentioned here is that a district court would have greater expertise and experience in this regard than the Commission. Judge Campbell so held in *Thill*:

> It is in this area of public protection that the SEC claim their expertise. On the other hand, it should be remembered that the courts of the United States have over the years become the repository of antitrust expertise. (433 F. 2d at 273.)

Whatever the validity of this holding with regard to the "anti-rebate rule," it is doubtless true here where the technical complexities do not approach those present in *Thill*.

(4) The possibility of achieving the aims of the Sherman Act without subjecting exchanges to treble damage suits.

I would think that the aims of the Sherman Act could only be achieved by enforcing that Act against Exchanges which make unlawful transfers of membership for anti-competitive reasons. Perhaps the nature of the action in *Thill* presents a more difficult question; however, I am able to think of no legitimate public policy goals which are advanced by insulating this Exchange from antitrust liability given the conduct alleged in the complaint. The majority opinion indicates none. Yet, the opinion intimates that because of a "potential repugnance between a decision of the Commodity Exchange Commission and the award of treble damages in an antitrust action" (*infra* at p. 11), the aims of the Sherman Act should be subordinated to the aims of the Commodity Exchange Act. This "potential

repugnance" stems from Commission discretion to refuse to report minor violations of its cease and desist orders.[11] Apparently the majority would permit the Commission, which does not have jurisdiction to consider the question of damages, to foreclose private suits if such foreclosure were deemed in the public interest.

This reconciliation of the Commodities Exchange Act and the Sherman Act is not consistent with prior Supreme Court decisions on the subject. *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 351 (1963); *United States* v. *Borden*, 308 U.S. 188, 198-200 (1939). Significantly, there is no statutory standard or detailed economic regulation to guide the Commission in making its "public interest" determination. *United States* v. *Philadelphia National Bank, supra; California* v. *Federal Power Com'n*, 369 U.S. 482, 484-85, 487-88 (1962). In fact, there is no suggestion that the Commission has ever considered, or desires to consider, the economic impact of its decisions. This is not true either of the FPC or the Comptroller of the Currency. *United States* v. *Philadelphia National Bank, supra; California* v. *Federal Power Com'n, supra.* Yet, these bodies do not possess the kind of power the majority would confer on the Commodity Exchange Commission.

Moreover, there is no "potential repugnance" between the Commodity Exchange Act and the Sherman Act. All Congress has done by granting the Commission the aforementioned discretion is to allow the Commission the traditional freedom available to any public prosecutor. It is a cardinal principal of legislative interpretation to construe away from inconsistencies. Here such a construction is not only unstrained, but also the natural meaning to be given the words used. Faced with this situation, a court should not create inconsistencies and then purport to reconcile them.

For the foregoing reasons, I believe the proper disposition of this case is a remand to the district for further proceedings.

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[11] 7 U.S.C. §13(b).

ORDER

For the Seventh Circuit
Chicago, Illinois 60604

TUESDAY, OCTOBER 5, 1971

Before

Hon. LUTHER M. SWYGERT, *Chief Judge*
Hon. ROGER J. KILEY, *Circuit Judge*
Hon. THOMAS E. FAIRCHILD, *Circuit Judge*
Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. OTTO KERNER, *Circuit Judge*
Hon. WILBUR F. PELL, JR., *Circuit Judge*
Hon. JOHN PAUL STEVENS, *Circuit Judge*
Hon. ROBERT A. SPRECHER, *Circuit Judge*

THOMAS RICCI,
Plaintiff-Appellant,
No. 18222
v.
CHICAGO MERCANTILE EXCHANGE, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

On consideration of the petition for rehearing and suggestion that it be heard *en banc* filed in the above-entitled cause, and the answers of opposing counsel in response thereto, a vote of the active members of the court was requested, and all members of the panel having voted to deny a petition for rehearing, and a majority of the active members having voted to deny a rehearing *en banc,*

IT IS ORDERED that the petition for rehearing and the petition for rehearing *en banc* be, and the same are hereby denied.

Judge Stevens voted to grant the petition for rehearing *en banc.*

No.

FILED
JAN 3 1972
E. ROBERT SEAVER, CLERK

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In the
Supreme Court of the United States
October Term, 1971

THOMAS RICCI,

Petitioner,

v.

CHICAGO MERCANTILE EXCHANGE, an Illinois not-for-profit corporation, EVERETTE B. HARRIS, WILLIAM PHELAN, LEO MELAMED, THE SIEGEL TRADING COMPANY, a corporation, and JOSEPH SIEGEL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1971

No.

THOMAS RICCI,

Petitioner,

v.

CHICAGO MERCANTILE EXCHANGE,
an Illinois not-for-profit corporation,
EVERETTE B. HARRIS,
WILLIAM PHELAN, LEO MELAMED,
THE SIEGEL TRADING COMPANY, a corporation,
and JOSEPH SIEGEL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Petitioner, Thomas Ricci, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on June 17, 1971 and the order of said Court denying petitioner's Petition for Rehearing on the Issue of Primary Jurisdiction, dated October 5, 1971.

OPINIONS BELOW

The decision of the United States District Court for the Northern District of Illinois, Civil Action No. 69 C 1030 (1970) (unpublished), the opinion of the Court of Appeals, 414 F.2d 713 (7th Cir., 1971) and the order of the Court of Appeals denying the Petition for Rehearing on the Issue of Primary Jurisdiction (unpublished), appear in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on June 17, 1971. A timely petition for rehearing was denied on October 5, 1971. This Petition for a writ of Certiorari is filed within 90 days from that latter date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1)

QUESTIONS PRESENTED

1. Whether, having found that a complaint properly alleges group boycott, a *per se* violation of Section 1 of the Sherman Act (15 U.S.C. § 1), by a commodities exchange, its officers and a member, the Court of Appeals erred in ordering that the complaint be submitted for decision to the Commodity Exchange Commission and/or the Secretary of Agriculture.

2. Whether, under Section 4 of the Clayton Act (15 U.S.C. § 15), the District Court as the statutory antitrust court has sole jurisdiction over a private antitrust treble damage action involving a commodities market, where the Commodity Exchange Act provides neither an exemption from the antitrust laws nor a remedy for injuries incurred as a result of violations thereof, nor gives standing before any administrative body to the injured plaintiff.

3. Whether there exists a repugnancy between the antitrust laws and the Commodity Exchange Act and the respective objectives thereof which requires the resolution of antitrust questions by an administrative agency empowered to enforce only the statute which created it.

STATUTORY PROVISIONS INVOLVED

Section 4 of the Clayton Act (15 U.S.C. §15) provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

The pertinent provisions of the Commodity Exchange Act (7 U.S.C. §1 et seq.) appear in the Appendix hereto.

STATEMENT

This action was brought by petitioner under Section 4 of the Clayton Act (15 U.S.C. §15) for damages, alleging violation of Section 1 of the Sherman Act and tortious interference with commercial relationships. Named as defendants were the Chicago Mercantile Exchange (hereinafter "the Exchange") three of its officers and one of its members, Joseph Siegel and the Siegel Trading Company.* The Complaint alleges that petitioner had purchased a membership on the Exchange and was qualified to trade in commodities and commodity futures; that the defendants "willfully, knowingly and maliciously confederated, combined and conspired and agreed" to prevent

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* Collectively referred to for convenience as "Siegel."

petitioner from maintaining his membership on the Exchange and transacting business as a broker; that Siegel claimed to be the owner of petitioner's membership but that petitioner informed the Exchange that his indebtedness to Siegel, upon which the latter's claim was based, was more than offset by certain fees owed by Siegel to petitioner; that, thereafter, Siegel induced the defendant officers of the Exchange to breach its rules and, by various means, (including the issuance of an antedated release and the transfer of petitioner's membership to a third party), deprived petitioner of his membership and trading privileges. The effect of the alleged conspiracy was to completely exclude petitioner from trading during the period from February 11, to March 4, 1969. By virtue of the conspiracy, petitioner was seriously disadvantaged *vis a vis* the other members of the Exchange who were his competitors and was thereby injured in his business as a broker.

The District Court dismissed the Complaint for failure to state a cause of action under Section 1 of the Sherman Act.

The Court of Appeals (with all members of the panel in agreement) reversed, holding that:

> "Transfer of his [petitioner's] membership in violation of the rules of the Exchange and pursuant to a conspiracy to intentionally injure his business would constitute a group boycott, *per se* actionable under the Sherman Act."

However, the majority of the Court of Appeals (two judges), ***sua sponte*** in their opinion, ***without the issue of primary jurisdiction having at anytime been raised at any point in the proceedings,*** and over a strong dissent, ordered the cause remanded to the District Court with in-

structions to stay the proceedings pending action thereon "by the Commodities Exchange Commission and/or the Secretary of Agriculture." This petition for writ of certiorari is addressed solely to the issue of primary jurisdiction first raised by the Court of Appeals *subsequent* to oral argument.

REASONS FOR GRANTING THE WRIT

The decision of the court below represents a significant and serious departure from accepted principles of antitrust enforcement and primary jurisdiction in regulated industries. The decision improperly limits the operation of the antitrust laws against restraints of trade, monopolization and similarly unlawful conduct in commodity transactions. The Clayton Act places jurisdiction of antitrust actions exclusively in the United States District Courts, in absence of an express or clearly implied statutory exemption. The Commodity Exchange Act provides no such exemption. By remanding the cause to the Commodity Exchange Commission (hereinafter "CEC") or the Secretary of Agriculture (hereinafter "the Secretary"), neither of whom have any statutory authority or expertise to decide antitrust issues in private treble damage actions, the court below has placed an important area of the national economy (i.e., agricultural commodities) outside the scope of effective antitrust enforcement.

In *Silver* v. *New York Stock Exchange,* 373 U.S. 341, 342 (1963), this Court noted that the question of the application of the antitrust laws to securities exchanges was "of great importance to the public and the financial community." The issue before this Court in the instant cause is of equal importance to the public and to those who produce, sell and buy agricultural commodities.

The importance of the primary jurisdiction issue herein is demonstrated by the fact that there are now pending in various lower courts several antitrust cases involving commodities transactions in which the decision of the court below herein has been or almost surely will be raised by defendants. In *Phillips* v. *Chicago Mercantile Exchange,* No. 70 C 216 (N.D. Ill., 1970), the District Court denied

defendants' motion to stay the proceedings pending referral to the Commodities Exchange Commission but, as a result of the instant case, certified the question pursuant to 28 U.S.C. § 1292b. The Court of Appeals for the Seventh Circuit accepted the certificate. In *Seligson* v. *New York Produce Exchange*, No. 66 Civ. 1016 (S.D. N.Y., 1971), a similar motion was denied by Judge Edward L. Palmeri. There are currently pending similar motions in the United States District Court for the Northern District of Illinois in *Arenson* v. *Chicago Mercantile Exchange* (No. 71 C 854) and *Arenson* v. *Chicago Board of Trade* (No. 71 C 855), antitrust actions involving conspiracies to fix minimum brokerage fees and in *Paynesville Produce Co.* v. *Tyson's Foods, Inc.*, (No. 70 C 2560) * involving a conspiracy to restrict the supply and artificially raise the price of September, 1970 eggs on the Mercantile Exchange. Recently, antitrust actions for conspiracy to fix minimum fees have been filed by the Antitrust Division of the United States Department of Justice. (*United States* v. *Board of Trade of the City of Chicago*, No. 71 C 2875), and by private litigants alleging a conspiracy to restrict the supply and artificially raise the price of May, 1971 Idaho potatoes, *Gneiting* v. *Taggares*, (No. CIV 4 71 31, D. Idaho, 1971) *

In each of the foregoing antitrust actions, the existence of the primary jurisdiction issue raised herein by the Court of Appeals demonstrates the compelling need for the guidance of this Court so that the responsibility for adjudicating antitrust questions in the field of commodities trading will rest where the Congress placed it; within the jurisdiction of the District Courts. Without such guidance

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* The Commodities Exchange is not named as a defendant in the *Paynesville* and *Gneiting* cases.

from this Court, it must be expected that the parties in the foregoing actions, the lower courts and the administrative agencies will needlessly expend vast amounts of time, effort and resources as they dispute which tribunal has jurisdiction over violations of the antitrust laws. Thus, the issue presented by the lower court decision assumes a special significance in antitrust and administrative law of which this Court should take cognizance and give direction.

The court below improperly invoked the doctrine of primary jurisdiction for several reasons:

1. In absence of a specific statutory provision to the contrary, exclusive jurisdiction of antitrust actions rests in the United States District Courts.

2. The conduct herein complained of has been held to be a *per se* violation of Section 1 of the Sherman Act; it is not arguably lawful under any provision of the Commodity Exchange Act. Nor does that act create a pervasive regulatory scheme, the fulfillment of which can be achieved only by excluding the District Court.

3. The Commodity Exchange Act does not authorize either the Secretary or the CEC to provide exemptions from the antitrust laws or to make determinations regarding antitrust questions. Their administrative authority is, by the express provisions of the statute, limited to determinations concerning the Commodity Exchange Act.

4. Neither the CEC nor the Secretary have the power to award petitioner damages. Congress has determined that only the District Court can perform such functions in an antitrust case.

5. There is no necessity for uniformity of policy within the agencies involved with regard to the transactions for which relief is sought.

6. There is no particular agency expertise involved; in fact, neither the CEC nor the Secretary is as well qualified as the federal courts to resolve antitrust issues.

7. Petitioner is without standing to prosecute his claim in any forum but in a court.

I. Neither the Commodity Exchange Commission Nor the Secretary of Agriculture have the Power to Grant Immunity from the Antitrust Laws

This Court has repeatedly held that the antitrust laws represent fundamental economic policy. Repeal of antitrust laws by implication in a regulated industry is not favored. *California* v. *Federal Power Commission*, 369 U.S. 482, 485 (1962); *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 348 (1963); *United States* v. *Borden Co.*, 308 U.S. 188, 201 (1939); *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213, 217 (1966).

In *Carnation*, this Court stated:

> "We recently said: 'Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions.' *United States* v. *Philadelphia National Bank*, *supra*. *We have long recognized that the antitrust laws represent a fundamental national economic policy and have therefore concluded that we cannot lightly assume that the enactment of a special regulatory scheme for particular aspects of an industry was intended to render the more general provisions of the*

> *antitrust laws wholly inapplicable to that industry.* We have, therefore, declined to construe special industry regulations as an implied repeal of the antitrust laws even when the regulatory statute did not contain an accommodation provision . . ." (383 U.S. at 217-218, emphasis supplied)

The foregoing principle has been ignored by the majority decision of the court below which, without authority in either the language of the Commodity Exchange Act or its objectives, deprives the district court of that function which Congress specifically placed within its province, i.e., the determination of liability and damages in private antitrust actions. The administrative body to which the court below remanded this cause is given authority only to investigate, punish or prevent violations of the Commodity Exchange Act. Nowhere in that Act are either the Secretary or the CEC given authority to consider, investigate, punish, prevent or give damages in situations involving violation of the antitrust laws. Judge Kerner, dissenting in the court below, stated:

> "Congress has strictly limited the jurisdiction of the Secretary of Agriculture and the Commission to violations 'of the provisions of this chapter' (see, e.g. Title 7 U.S.C., §13a). This chapter means the 'Commodity Exchange Act' (Title 7, USC, §1) and not the 'Sherman Act', which is found at 15 USC §1."

Although the Commodity Exchange Act confers neither antitrust powers nor exemptions, Section 4 of the Clayton Act provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor *in any district court of*

> *the United States* . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." (Emphasis supplied)

The absence of any express repugnancy between the antitrust and commodities laws is similarly reflected, as we show below, in the objectives and structure of the scheme established by Congress to regulate commodities trading.

II. The Regulatory Scheme of the Commodity Exchange Act is Not so Pervasive as to Encompass or Exclude Antitrust Enforcement by the District Court

The Commodity Exchange Act assigns to the Secretary the authority to license and regulate commodity exchanges and trading thereon. The limited regulatory scheme thus established is not so pervasive as to exclude or supplant competitive principles protected by the antitrust laws. Nor does the scheme of regulation provide any mechanism which, as in rate making or route assignments in transportation, substitutes agency action for competition. This lack of pervasive regulation bars the application of the doctrine of primary jurisdiction in the instant case. *California* v. *Federal Power Commission*, 369 U.S. 482 (1962); *Maryland and Virginia Milk Producers Ass'n.* v. *United States*, 362 U.S. 458 (1960); *United States* v. *Radio Corporation of America*, 358 U.S. 334, 350 (1959); See also, *United States* v. *Borden Co.*, 308 U.S. 188, 199-204 (1939); *Denver Union Stock Yards Co.* v. *Denver Live Stock Commission Co.*, 404 F.2d 1055, 1059 (10th Cir., 1968); *cert denied*, 394 U.S. 1014 (1969); *McKeon Construction Co.* v. *McClatchy Newspapers*, 1970 C.C.H. Trade Cases ¶¶73, 212 (N.D. Cal., 1969). The regulatory scheme relied upon by the court below is far less pervasive than those consid-

ered in the foregoing cases wherein this Court held that the doctrine of primary jurisdiction could not be invoked for the lack of such pervasiveness.

In *United States* v. *Radio Corporation of America*, 358 U.S. 334 (1959), the complaint alleged that RCA and its wholly owned subsidiary, NBC, were engaged in a continuing conspiracy in violation of Section 1 of the Sherman Act the object of which was to acquire stations in five of the eight largest market areas in the country, and that in furtherance thereof, NBC had utilized the leverage of network affiliation to force Westinghouse Broadcasting Co. to exchange its Philadelphia station for NBC's station in Cleveland. The defendants asserted an affirmative defense based upon the Federal Communications Commission's approval of the exchange. This Court found, however, that Congress had not empowered the FCC to decide antitrust questions nor was the agency's action intended by Congress as a bar against antitrust enforcement by the federal courts in the television broadcast industry. This Court compared the power of the FCC with that of the Interstate Commerce Commission in the regulation of common carriers, and stated:

> "There carriers could charge only the published tariff, and that that tariff must have been found by the appropriate agency to have been reasonable. *Free rate competition was modified by federal controls.* The court's concern was that the agency which was expert in, and responsible for, administering those controls should be given the opportunity to determine questions within its special competence as an aid to the courts in resolving federal antitrust policy and federal regulatory patterns into a cohesive hold. *That some resolution is necessary when the antitrust policy of free com-*

petition is placed beside a regulatory scheme involving fixed rates is obvious." (358 U.S. at 348, emphasis supplied)

This Court observed that television is also a regulated industry, but ". . . it is regulated in a very different way. That way is controlling," and that while regulation replaced free competition in the case of common carriers, "the field of broadcasting is one of free competition." This Court then concluded:

> "'The sections dealing with broadcasting demonstrate that *Congress has not, in its regulatory scheme, abandoned the principle of free competition* as it is done in the case of railroads . . .' Thus, there being no pervasive regulatory scheme, and no rate structures to throw out of balance, sporadic action by federal courts can work no mischief. The justification for primary jurisdiction accordingly disappears." (358 U.S. at 349, emphasis supplied)

Likewise, there is nothing in the Commodity Exchange Act which indicates that Congress intended regulation to insulate group boycotts from the antitrust laws. The defendants' private decisions, unapproved by the administrative agency, excluded petitioner from the market place. Petitioner's exclusion was accomplished by a conventional business conspiracy which, among other things, may have violated the rules of the Exchange. Whether this fact would justify the Secretary in punishing the perpetrators of the wrong by excluding them from trading is irrelevant to antitrust considerations. Whether the Secretary wishes to exercise his discretion not to report a group boycott for prosecution because he considers it a "minor violation" of the Commodity Exchange Act is similarly irrelevant. These are *ad hoc* determinations of administrative officers, not vital components of a pervasive regulatory

system. On the other hand, consideration of antitrust issues in this case by the district court will not throw administratively established rate structures out of balance or disrupt a regulatory program which has replaced competition in the interest of the public. Simply stated, this case involves a statutory wrong done an individual which is not justified, immunized or excused by any pervasive regulatory scheme. Hence, as this Court noted in *RCA*, "action by federal courts can work no mischief. The justification for primary jurisdiction accordingly disappears." (358 U.S. at p. 350)

In the instant case, enforcement of the antitrust laws is entrusted neither to the CEC nor the Secretary. While the Secretary may punish the defendants or refuse to report the boycott as a "minor violation" of the Commodity Exchange Act he is not authorized to immunize the participants in a boycott from liability under the Sherman Act.

The decision of the court below is inconsistent with the decisions involving stockyards, which, like commodities exchanges, provide unique centralized facilities for agricultural transactions. Individuals in the industry are dependent upon them for the conduct of their business. Like exchanges, stockyards are partially regulated by the Secretary of Agriculture.* But it has been held that the regulation is not pervasive, and the antitrust laws may be applied to conduct outside the particular province of the administrator. *Denver Union Stockyards Co.* v. *Denver Livestock Commission Co.*, 404 F.2d 1055 (10th Cir., 1968); *Crain* v. *Blue Grass Stockyards Co.*, 399 F.2d 868 (6th Cir., 1968). In *Denver Union*, a livestock market agency brought a private antitrust action against the owner of a stockyard

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* Under the Packers and Stockyards Act of 1921, 7 U.S.C. § 181 et. seq.

charging monopolization of the business in Denver, Colorado. The Court of Appeals stated:

> "The Secretary is given no power over acquisitions and mergers. Those regulated may abandon their activities without agency approval. In our opinion, the act is not of the pervasive character which, when found in other acts, has resulted in the invocation of the primary jurisdiction doctrine. The determination of whether the charged antitrust violations have occurred does not require administrative expertise and court action will not impair or interfere with the coherence or uniformity of an intricate administrative program.
>
> "We believe that the pleadings present antitrust issues which call for judicial action." (404 F.2d at 1059)

In this case, the Secretary is given no power over group boycotts and similar restraints of trade. The defendants acted in an area outside the scope of administrative regulation and should be subject to judicial action.

III. The Administrative Agency is Without Power to Grant Relief to Petititioner

Even if the CEC or the Secretary were authorized to make antitrust determinations, they are clearly without power to award damages as provided for in Section 4 of the Clayton Act. Petitioner cannot even prosecute his own claim before the agency. He may ask leave to intervene in agency proceedings but the agency may exclude him if it so desires. Reference to such an impotent body serves only to frustrate or delay petitioner's right to his day in court. *Allied Air Freight, Inc.* v. *Pan American World Airways, Inc.*, 393 F.2d 441 (2d Cir., 1968), *cert. denied*, 393 U.S. 846 (1968); *Trans World Airlines* v. *Hughes*, 214 F.Supp. 106 (S.D.N.Y., 1963), *aff'd.*, 332 F.2d 602 (2d Cir., 1964); *Breen Air Freight, Ltd.* v. *Air Cargo, Inc., et al.*,

1971 CCH Trade Cas. ¶73,775 (S.D.N.Y., 1971). See also *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296 (1963); *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213, 222 (1966).

In *Trans World Airlines* v. *Hughes*, the district court held that, although the acquisition of an airline by an aircraft supplier had been approved by the Civil Aeronautics Board, the supplier was not thereby immunized from a suit for treble damages charging the supplier with monopolizing the sale and lease of aircraft and conspiring to finance only purchases of its aircraft by the acquired airline. The court stated:

> "Furthermore, the Board has no power to award damages, and we do not reach the statement of the Court in Panagra [Pan American World Airways, Inc. v. United States, 371 U.S. 296 (1963)] to the effect that since the Board's essential regulatory powers deal with division of territories, etc., then Congress must have intended to give it authority that was ample to deal with evil at hand. *Rather, the statement by the Court that a court has jurisdiction under the antitrust laws if the agency has no power to grant relief is controlling here.*" (214 F.Supp. at 111-112, emphasis supplied)

On appeal, the Court of Appeals for the Second Circuit (332 F.2d 602) stated, in affirming, that in the absence of explicit Congressional mandate relegating the alleged unlawful transactions to the CAB, there was no basis for declaring federal courts to be without jurisdiction. Moreover, there was no necessity for a uniformity of policy with respect to these transactions nor was the Board more qualified to consider such charges than the federal courts, ". . . which daily encounter and resolve antitrust problems."

IV. The Action of the District Court in a Treble Damage Case Will Not Impinge on the Administration of the Commodity Exchange Act.

In the case at bar the statutes do not entrust antitrust questions to the CEC or the Secretary. Nor will the action of the district court impinge upon the agency's regulatory obligations. The court below did not and indeed could not find that the conduct in question was arguably lawful even under the regulatory scheme. In absence of any regulatory justification for the defendants' conduct, the doctrine of primary jurisdiction is inapplicable. *Carnation Co.* v. *Pacific Westbound Conference,* 383 U.S. 213, 221-222 (1966); *Allied Air Freight, Inc.* v. *Pan American World Airways,* 393 F.2d 441 (2d Cir., 1968), *cert. denied,* 393 U.S. 846 (1968); *Marnell* v. *United Parcel Service of America, Inc.,* 260 F. Supp. 391 (N.D. Calif., 1966); *Breen Air Freight, Ltd.* v. *Air Cargo, Inc.,* 1971 CCH Trade Cas. ¶73, 775 (S.D.N.Y., 1971).

In *Carnation,* a shipper sought treble damages against certain conferences of shipping companies on grounds that they had violated the antitrust laws in maintaining shipping rate increases for evaporated milk pursuant to rate making agreements which had not been approved by the Federal Maritime Commission. This Court distinguished its decisions in *Far East Conference* v. *United States,* 342 U.S. 570 (1952) and *United States Navigation Co.* v. *Cunard S.S. Co.,* 284 U.S. 474 (1932), cited by the majority of the court below herein. In those cases, plaintiffs sought to *enjoin* implementation of unapproved agreements, thereby creating the possibility of a conflict between the courts and the Federal Maritime Commission. However, the Court stated:

> "The award of treble damages for *past and completed conduct which clearly violated the Shipping Act would certainly not interfere with any future action of the Commission.* Although the Commission can approve prospective operations under agreements which have been implemented without approval, respondents concede that the Commission has no power to validate pre-approval implementation of such agreemnts. Therefore, the *Far East* and *Cunard* principles only preclude courts from awarding treble damages when the defendants' conduct is arguably lawful under the Shipping Act." (383 U.S. at 222, emphasis supplied)

In the instant case, a group boycott is not arguably lawful under the Commodity Exchange Act. Thus, reference to an administrative agency is unnecessary and, since it frustrates petitioner's right to seek redress under the antitrust laws, improper. Petitioner is not seeking a determination as to whether the rules of the Exchange which defendants violated in the course of the conspiracy were reasonable within the purview of the Commodity Exchange Act. The issue raised by the Complaint is simply whether defendants conspired to exclude petitioner from trading. That defendants might also have violated Exchange rules in so doing cannot thereby immunize them from the operation of the antitrust laws. It requires no particular administrative expertise to determine whether the defendants so conspired or whether, in the course of so doing, they violated Exchange rules. *Crain* v. *Blue Grass Stockyards Co.*, 399 F.2d 868, 872 (6th Cir., 1968); *Breen Air Freight, Ltd.* v. *Air Cargo, Inc.*, 1971 CCH Trade Cas. ¶73,775 (S.D.N.Y., 1971). In a recent opinion, the district court in *Breen Air Freight, Ltd.* followed this Court's reasoning in *Carnation*. The court stated:

> "The issue is not the interpretation of an unapproved agreement or whether the order [approving the establishment of Air Cargo] itself is reasonable, but whether the order has been violated. The courts are competent to make such an interpretation."

In the instant case, the court below recognized that the defendants' conduct was without "debatable legality" under the regulatory legislation. See *Marnell* v. *United Parcel Service,* 260 F.Supp. 391 (N.D. Cal. 1966) at p. 412. The majority appears concerned only that the CEC or the Secretary might consider defendants' actions to be "minor violations" and that an award of treble damages, which the court below considered to be "essentially punitive in nature," would conflict with an agency decision that punitive action allowable under the Commodity Exchange Act should not be taken. So narrow a consideration disregards this Court's repeated recognition of the high public purpose of private treble damage actions. This Court, in *Fortner Enterprises, Inc.* v. *United States Steel Corp.,* 394 U.S. 495, 502 (1969) stated:

> "As the special provision awarding treble damages to successful plaintiffs illustrates, Congress has encouraged private antitrust litigation not merely to compensate those who have been directly injured but also to vindicate the important public interest in free competition."

Congress has stated that it is in the public interest for an individual to enforce the policy underlying the antitrust laws by seeking redress for injuries caused by violations of those laws. This is precisely what petitioner sought to do in this case. Contrary to the Congressional purpose, the majority in the court below has now assigned to an administrative agency the right to determine whether

defendants' past conduct is a "minor violation" of the Commodity Exchange Act or of the Exchange rules. The conduct in question had a substantial effect on the business of the petitioner and, regardless of the Secretary of Agriculture's feeling in the matter, the Congress has given to petitioner an action by which he may vindicate his rights.

None of the tests which have heretofore permitted a court to refer a matter to an administrative agency under the doctrine of primary jurisdiction are applicable in the instant case. There is no question of accommodation between the courts or the agencies. Resort to the agency will serve no purpose other than to delay petitioner's claim and to cause him additional expense in an attempt to vindicate the wrong done him. The late Mr. Justice Frankfurter, dissenting in *Meat Cutters Union* v. *Jewel Tea Co.*, 381 U.S. 676, 686 (1965), stated:

> ". . . The doctrine of primary jurisdiction is not a doctrine of futility; it does not require resort to 'an expensive and merely delaying administrative proceeding when the case must eventually be decided on a controlling legal issue wholly unrelated to determinations for the ascertainment of which the proceeding was sent to the agency.'"

In the instant case, the administrative agency has no special competence. Hence, deference to the administrator is beyond the needs of the administrative process and can only be time-consuming, expensive and wasteful.

CONCLUSION

By virtue of the foregoing, petitioner respectfully prays that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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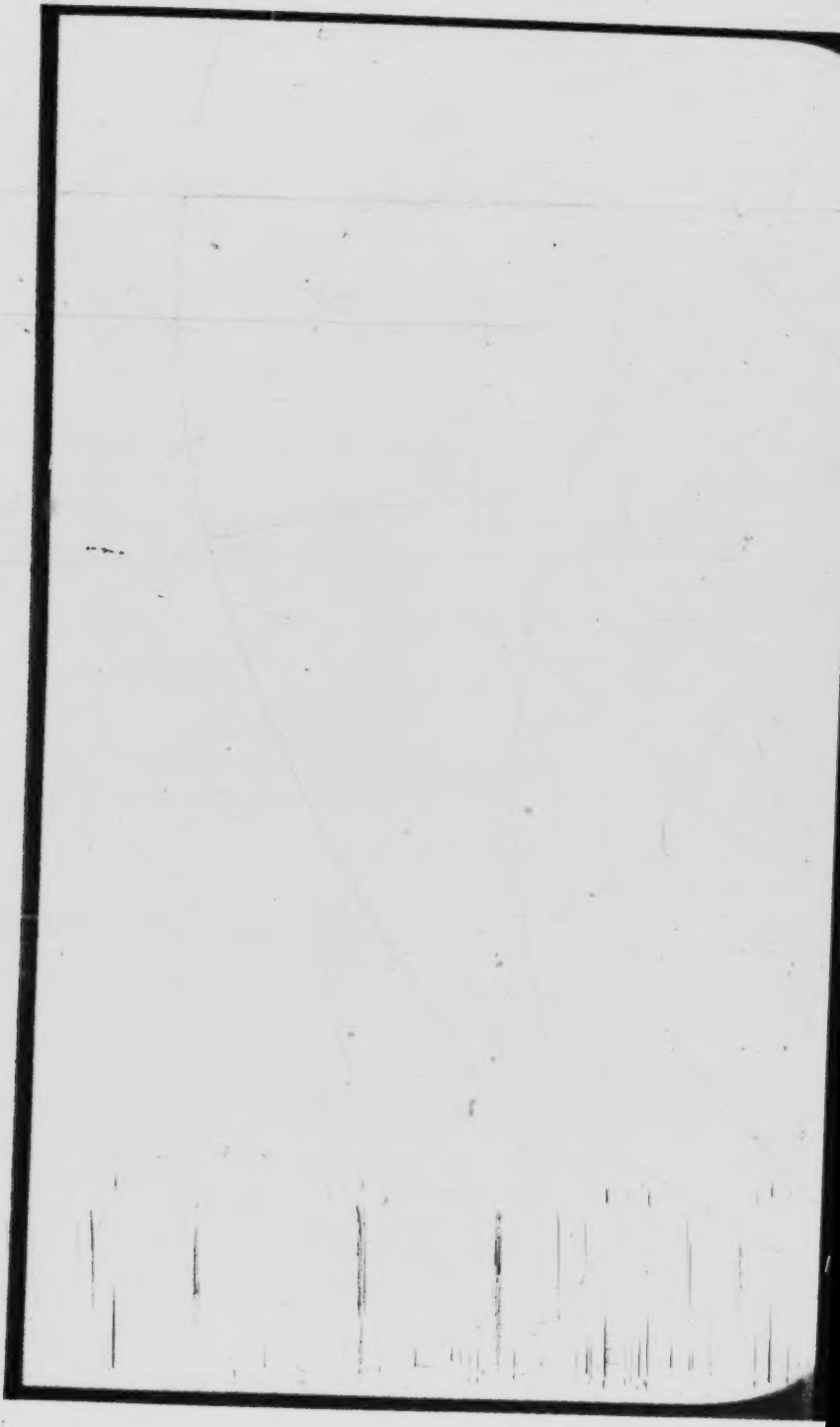

APPENDIX

The Commodity Exchange Act (7 USC §7 et seq.) provides in pertinent part:

"§7. Designation of board of trade as "contract market"; conditions and requirements

The Secretary of Agriculture is hereby authorized and directed to designate any board of trade as a "contract market" when, and only when, such board of trade complies with and carries out the following conditions and requirements:

* * *

"§7a. Duties of Contract Markets

Each contract market shall— . . .

(8) enforce all by-laws, rules, regulations, and resolutions, made or issued by it or by the governing board thereof or any committee, which relate * * * to other trading requirements, and which have not been disapproved by the Secretary of Agriculture . . ."

* * *

(9) enforce all by-laws, rules, regulations, and resolutions, made or issued by it or by the governing board thereof or by any committee, which provide minimum financial standards and related reporting requirements for . . . members of such contract markets. . . ."

* * *

"§7b. Suspension or revocation of designation as 'contract market'

The failure or refusal of any board of trade to comply with any of the provisions of this chapter, or any of the rules, regulations or orders of the Secretary of Agriculture or the commission thereunder, shall be cause for suspending for a period not to exceed six

months or revoking the designation of such board of trade as a 'contract market' in accordance with the procedure and subject to the judicial review provided in Section 8 of this title."

• • •

"§8. Application for designation as "contract market"; suspension or revocation of designation; composition of commission; review by court of appeals

Any board of trade desiring to be designated a "contract market" shall make application to the Secretary of Agriculture for such designation and accompany the same with a showing that it complies with the conditions of section 7 of this title, and with a sufficient assurance that it will continue to comply with the requirements of such section 7.

A commission composed of the Secretary of Agriculture, the Secretary of Commerce, and the Attorney General is authorized to suspend for a period not to exceed six months or to revoke the designation of any board of trade as a "contract market" upon a showing that such board of trade has failed or is failing to comply with any of the requirements of section 7 of this title or is not enforcing its rules of government made a condition of its designation as set forth in section 7 of this title. . . .

• • •

§13a. Non-enforcement of Rules of Government or other Violations, Cease and Desist Orders against contract markets; punishment; misdemeanor; separate offenses

If any contract market is not enforcing or has not enforced its rules of government made a condition of its designation as set forth in Section 7 of this title, or if any contract market, or any director, officer, agent, or employee of any contract market otherwise is violating or has violated any of the provisions of

this chapter or any of the rules, regulations, or orders of the Secretary of Agriculture or the commission thereunder, the commission may, upon notice and hearing and subject to appeal as in other cases provided in paragraph (a) of Section 8 of this title, make and enter an order directing that such contract market, director, officer, agent or employee shall cease and desist from such violation and if such . . . shall fail or refuse to obey or comply with such order, such contract market, director, officer, agent or employee shall be guilty of a misdemeanor and, upon conviction thereof shall be fined not less than $500 nor more than $10,000 or imprisoned for not less than six months or more than one year, or both. . .."

§13c. Responsibility as principal; minor violations

(a) Any person who commits, or who willfully aids, abets, counsels, commands, induces, or procures the commission of, a violation of any of the provisions of this chapter, or any of the rules, regulations, or orders issued pursuant to this chapter, or who acts in combination or concert with any other person in any such violation, or who willfully causes an act to be done or omitted which if directly performed or omitted by him or another would be a violation of the provisions of this chapter or any of such rules, regulation, or orders may be held responsible in administrative proceedings under this chapter for such violation as a principal.

(b) Nothing in this chapter shall be construed as requiring the Secretary of Agriculture or the commission to report minor violations of this chapter for prosecution, whenever it appears that the public interest does not require such action.

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

Name of Presiding Judge, Honorable James B. Parsons

Cause No. 69C1030 Nov. 25, 1969

Thomas Ricci v. Chicago Mercantile Exch. etal

Ruling on deft's motion to present Memo., Opinion and plaintiff's objcs. thereto.

Motion of defendants to dismiss the complaint, is allowed, and it is so ordered.

/s/ Parsons, J

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1970 — JANUARY SESSION, 1971

No. 18222

THOMAS RICCI,

Plaintiff-Appellant,

v.

CHICAGO MERCANTILE EXCHANGE, an Illinois not-for-profit corporation, EVERETTE B. HARRIS, WILLIAM PHELAN, LEO MELAMED, THE SIEGEL TRADING COMPANY, a corporation, and JOSEPH E. SIEGEL,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

JUNE 17, 1971

Before HASTINGS, *Senior Circuit Judge*, and KILEY and KERNER, *Circuit Judges*.

HASTINGS, *Senior Circuit Judge*. Plaintiff Ricci brought this action under sections 4 and 16 of the Clayton Act,

Title 15, U.S.C.A. §§ 15[1] and 26,[2] seeking injunctive relief and treble damages. The complaint charged defendants Chicago Mercantile Exchange, its president, Everette B. Harris, its vice-president, William Phelan, its board chairman, Leo Melamed, and Siegel Trading Company and its president, Joseph Siegel with violations of section 1 of the Sherman Act, Title 15, U.S.C.A. § 1[3] and tortious interference with commercial relationships. Siegel Trading Company and Siegel[4] moved to dismiss the complaint for failure to state a claim upon which relief could be granted and for want of jurisdiction. In a separate motion to

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[1] Title 15, U.S.C.A. § 15 provides:

"§ 15. Suits by persons injured; amount of recovery

"Any person who shall be injured in his business or property my reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

[2] Title 15, U.S.C.A. § 26 provides, *inter alia:*

"§ 26. Injunctive relief for private parties; exception

"Any person * * * shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws * * *."

[3] Title 15, U.S.C.A. § 1 provides, *inter alia:*

"§ 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States * * * is declared to be illegal * * *."

[4] Siegel Trading Company will be referred to as "Siegel." Likewise, the Chicago Mercantile Exchange and its officers will be referred to as the "Exchange" or the "Exchange defendants."

dismiss, the Exchange defendants argued the complaint failed to state a cause of action under section 1 of the Sherman Act. From an order granting defendants' motions to dismiss, plaintiff appeals.

Count I of appellant's six-count complaint alleged, in substance, that he purchased a membership in the Chicago Mercantile Exchange and became duly qualified to trade in commodities and commodity futures pursuant to the rules of the Exchange and the Commodities Exchange Authority. On February 11, 1969, Siegel induced the Exchange and its officers to transfer appellant's membership to James F. Reich, without hearing or notice, utilizing a previously revoked blank authorization to transfer membership. Such action was allegedly in violation of the rules and regulations of the Exchange and the Commodity Exchange Act and was done in pursuance of an unlawful conspiracy with the intent and for the purpose of restraining appellant from conducting his lawful business.[5] As a result of such transfer, appellant was excluded from trading on the Exchange from February 11, 1969 until March 4, 1969 when he purchased another membership for $45,000.

Counts III and V of the complaint are directed against the Exchange and the individual defendants and reallege the allegations of Count I with respect to violation of the Sherman Act. Counts II, IV and VI charge tortious interference with advantageous commercial relationships and, since all parties are residents of Illinois, will necessarily fall for want of jurisdiction if the Sherman Act allegations are not sustained.

The Exchange defendants claim that the trial court, in ruling on the motions to dismiss, admitted evidence

[5] Plaintiff also alleges that the conspirators attempted to induce a "Clearing Member" of the Exchange to issue an antedated release of its authorization of Ricci to trade to Siegel and that the Exchange knowingly failed to enforce its own rules relating to financial reporting. No specific damage is assigned to these allegations.

other than that stated in the complaint and thereby converted them into motions for summary judgment. See, Fed. R.Civ. P. 12(b), 56. If this were true, it would allow this court to examine deposition testimony which appellees contend entirely disposes of the case. The short answer is that the transcript of the hearing on the motion to take depositions demonstrates that the court below was considering only the allegations in the complaint when it ruled on the motions to dismiss.

Since this is an appeal from an order granting Rule 12(b), Fed. R.Civ. P., motions to dismiss, we must accept appellant's foregoing allegations of fact as true. *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172, 174-75 (1965); *Duzynski* v. *Nosal*, 7 Cir., 324 F. 2d 924 (1963).

I

Appellant first contends that, absent any justification to be derived from the Chicago Mercantile Exchange's status as a board of trade and a designated "contract market" under the Commodities Exchange Act, Title 7, U.S.C.A. § 1 *et seq.*, the allegations of the complaint are sufficient to allege a group boycott, a *per se* violation of section 1 of the Sherman Act.

Relying on *Scanlon* v. *Anheuser Busch, Inc.*, 9 Cir., 388 F. 2d 918 (1968), cert. denied, 391 U.S. 916 (1968) and *Ace Beer Distributors, Inc.* v. *Kohn, Inc.*, 6 Cir., 318 F. 2d 283 (1963), cert. denied, 375 U.S. 922 (1963), the Siegel defendants argue that the facts allegedly merely amount to the substitution of one competitor for another with no resulting public injury and are, therefore, not within the purview of the antitrust acts.

Scanlon, supra, and *Ace Beer, supra,* are inapplicable to the case at bar. Each concerned the cancellation of individual exclusive beer distributing contracts with the immediate substitution of other distributors. The relevant markets were competitive and the courts held that no unreasonable restraint of trade resulted from the refusals

to deal since existing competition was not diminished and the cancellation was not an unusual business procedure. See, *Ace Beer, supra* at 287.

Appellant has alleged his exclusion from the Chicago Mercantile Exchange, a monopolistic market, was in violation of its own rules and regulations. Such exclusion is alleged to be a part of a conspiracy to intentionally injure his business. In *Gamco, Inc.* v. *Providence Fruit & Produce Bldg.*, 1 Cir., 194 F. 2d 484 (1952), cert. denied, 344 U.S. 817 (1952), the court was confronted with the exclusion of a trader from a produce building where the sales of fresh fruits and vegetables occurred. The board that managed the building refused to renew the trader's lease after its expiration. The court in finding violations of sections 1 and 2 of the Sherman Act said:

> "[T]he latent monopolist must justify the exclusion of a competitor from a market which he controls. Where, as here, a business group understandably susceptible to the temptations of exploiting its natural advantage against competitors prohibits one previously acceptable from hawking his wares beside them any longer at the very moment of his affiliation with a potentially lower priced outsider, they may be called upon for a necessary explanation. The conjunction of power and motive to exclude with an exclusion not immediately and patently justified by reasonable business requirements establishes a prima facie case of the purpose to monopolize." *Id.* at 488.

Accepting, as we must, appellant's allegations as to the reasons and manner in which he was excluded, there is no justification for the actions of the Exchange and the individual defendants. The transfer of his membership in violation of the rules of the Exchange and pursuant to a conspiracy to intentionally injure his business would constitute a group boycott, *per se* actionable under the Sherman Act.

The absence of an allegation of public injury is not fatal to the maintenance of an action where a *per se* violation is alleged. *Radiant Burners, Inc.* v. *Peoples Gas, Light and Coke Co.*, 364 U.S. 656 (1961); *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *Switzer Brothers* v. *Locklin*, 7 Cir., 297 F. 2d 39 (1961).

Likewise, where the defendants enjoy the power to deny potential competitors access to the market, the absence of competitive change in the relevant market is not fatal to the cause of action. *Gamco, Inc., supra* at 487.

Finally, this is not a case, as appellees contend, where appellant has used traditional antitrust language to transform an essentially state cause of action into a federal antitrust claim. *Compare, Norville* v. *Globe Oil & Refining Co.*, 7 Cir., 303 F. 2d 281 (1962); *Parmelee Transportation Company* v. *Keeshin*, 7 Cir., 292 F. 2d 794 (1961).

In view of the foregoing, we conclude that, absent any justification from the Exchange's status as a board of trade and a designated "contract market," the complaint is sufficient to allege a group boycott, a *per se* violation of section 1 of the Sherman Act.

II

Relying primarily on *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963), appellant asserts that no justification can be derived either from the Commodities Exchange Act or from the Exchange's status as a board of trade for the actions herein alleged. Consequently, he claims a cause of action under section 1 of the Sherman Act has been stated.

In *Silver, supra*, member firms of the New York Stock Exchange were ordered by the Exchange to terminate private telephone and tickertape connections to Silver's over-the-counter brokerage firms. The Court, observing that the concerted cut-off by the Exchange and its members had

deprived Silver of an asset important to his ability to compete as a broker-dealer, said that such conduct would have been a *per se* violation of the Sherman Act "absent any justification derived from the policy of another statute or otherwise." *Id.* at 348-49. However, because of the existence of the mandate of self-regulation present in the Securities Exchange Act, the Court sought to "reconcile pursuit of the antitrust aim of eliminating restraints on competition with the effective operation of a public policy contemplating that securities exchanges will engage in self-regulation which may well have anticompetitive effects in general and in specific applications." *Id.* at 349.

The Court concluded that under the circumstances of the case, it did not have to complete the accommodation between the acts since the Exchange did not reach the threshold of justification under the statute and had plainly exceeded the scope of its authority to engage in self-regulation by not informing Silver of the charges underlying the decision to terminate the connections and by not providing an appropriate opportunity to explain or refute such charges despite prompt and repeated requests therefor. *Id.* at 361, 365.

Appellant here contends that the Exchange was not justified in excluding him from trading because nothing in the statutory scheme allows the Exchange to discipline brokers by excluding them from trading. Even if there were such statutory authorization, here he was afforded neither hearing nor notice and, thus, he claims the Exchange did not reach the threshold of justification. Assuming these contentions to be true, they do not dispose of this case.

The Chicago Mercantile Exchange is a "contract market" designated by the Secretary of Agriculture to conduct future trading in commodities pursuant to the Commodity Exchange Act, as amended, Title 7, U.S.C.A. § 1, *et seq.* As a condition of such designation, it must fulfill certain statutory requirements including the enactment and enforcement of bylaws, rules and regulations which relate to

"trading requirements"[6] and which provide "minimum financial standards and related reporting requirements"[7] for members of such markets.

Failure to enforce these bylaws, rules and regulations may result in suspension or revocation of the contract market designation[8] as well as cease and desist proceedings with attendant misdemeanor penalties for failure to com-

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[6] Title 7, U.S.C.A. § 7a provides, *inter alia:*

"§ 7a. Duties of contract markets

Each contract market shall—

* * *

"(8) enforce all bylaws, rules, regulations, and resolutions, made or issued by it or by the governing board thereof or any committee, which relate * * * to other trading requirements, and which have not been disapproved by the Secretary of Agriculture * * *."

[7] Title 7, U.S.C.A. § 7a provides, *inter alia:*

"§ 7a. Duties of contract markets

Each contract market shall—

* * *

"(9) enforce all bylaws, rules, regulations, and resolutions made or issued by it or by the governing board thereof or by any committee, which provide minimum financial standards and related reporting requirements for * * * members of such contract market * * *."

[8] Title 7, U.S.C.A. § 7b provides:

"§ 7b. Suspension or revocation of designation as 'contract market'

"The failure or refusal of any board of trade to comply with any of the provisions of this chapter, or any of the rules, regulations, or orders of the Secretary of Agriculture or the commission thereunder, shall be cause for suspending for a period not to exceed six months or revoking the designation of such board of trade as a 'contract market' in accordance with the procedure and subject to the judicial review provided in section 8 of this title."

ply.[9] Anyone who acts singly or in concert with another to bring about a violation of rules and regulations issued pursuant to the Act is liable as a principal for such violations and may be subjected to loss of trading privileges on contract markets, as well as cease and desist proceedings with attendant penalties.[10]

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[9] Title 7, U.S.C.A. § 13a provides, *inter alia:*

"§ 13a. Nonenforcement of rules of government or other violations, cease and desist orders against contract markets; punishment; misdemeanor; separate offenses

"If any contract market is not enforcing or has not enforced its rules of government made a condition of its designation as set forth in section 7 of this title, or if any contract market, or any director, officer, agent, or employee of any contract market otherwise is violating or has violated any of the provisions of this chapter • • • the commission may, upon notice and hearing and subject to appeal as in other cases provided for in paragraph (a) of section 8 of this title, make and enter an order directing that such contract market, director, officer, agent, or employee shall cease and desist from such violation, [and upon failure or refusal to comply] shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than $500 nor more than $10,000 or imprisoned for not less than six months nor more than one year, or both. • • •"

[10] Title 7, U.S.C.A. § 13c(a) provides:

"§ 13c. Responsibility as principal; • • •

"(a) Any person who commits, or who willfully aids, abets, counsels, commands, induces, or procures the commission of, a violation of any of the provisions of this chapter, • • • or who acts in combination or concert with any other person in any such violation, or who willfully causes an act to be done or omitted which if directly performed or omitted by him or another would be a violation of this chapter • • • may be held responsible in administrative proceedings under this chapter for such violation as a principal."

The facts alleged by appellant to support his antitrust charge are either violations or induced violations of Exchange rules, promulgated pursuant to the Act, which relate to "trading requirements" and financial reporting requirements.[11] As such, they could have been examined by the Commodity Exchange Commission or the Secretary of Agriculture.[12]

Thus, we are *not* confronted with the problem in *Silver* wherein there was "nothing built into the regulatory scheme which performs the antitrust function of insuring that an exchange will not in some cases apply its rules so as to do injury to competition which cannot be justified as furthering legitimate self-regulative ends." *Id.* at 358. Rather, the maintenance of a private treble-damage suit in the instant case presents the "problem of conflict or co-extensiveness of coverage with the agency's regulatory power" not considered in *Silver*. *Id.* at 358.

Chief Judge Swygert, in his concurring opinion to *Thill Securities Corp.* v. *New York Stock Exchange*, 7 Cir., 433 F. 2d 264 (1970), cert. denied, 39 U.S.L.W. 3424 (U.S. Mar. 30, 1971), suggested that the district court, on remand, consider this problem of coextensiveness of coverage by determining whether the Securities Exchange Commission

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[11] Membership in a contract market is a prerequisite to lawful trading in commodities futures. Title 7, U.S.C.A. § 6. Therefore, Rule 307, allegedly violated in the transfer of appellant's membership, and Rule 322, allegedly violated in the attempt to cancel appellant's authorization to trade, both relate to "trading requirements." The other alleged violation was the failure to enforce financial reporting rules.

[12] The Commission has jurisdiction over alleged violations by the Exchange and its officers. It is composed of the Secretary of Agriculture, the Secretary of Commerce and the Attorney General on their respective designees. The Secretary of Agriculture may decide to exclude members of contract markets from trading.

possessed primary jurisdiction to judge the New York Stock Exchange's allegedly anticompetitive antirebate rule. *Id.* at 276. The resolution of this issue depended, in part, on the consideration of the following factors: (1) the SEC's power to weigh antitrust policy in fulfilling its duty of review of Exchange self-regulation; (2) the ability of an aggrieved party to initiate SEC review; (3) the extent that SEC expertise would be useful in resolving the question of whether the antirebate rule was necessary to make the Securities Exchange Act work; and (4) the possibility of achieving the aims of the Sherman Act without subjecting exchanges to treble damage suits. *Id.* at 277.

Applying these criteria to the instant case, we think it appropriate for the invocation of the doctrine of primary jurisdiction. There exists no express or implied exemption in the Commodity Exchange Act that would prevent the Secretary of Agriculture or the Commodity Exchange Commission from taking into account antitrust principles in their deliberations pursuant to the Act. Judge Leventhal, concurring in *Cities of Statesville* v. *AEC*, D.C. Cir., ... F. 2d ....., (Slip opinion No. 21,706, Dec. 5, 1969) (*en banc*), observed:

> "It is a fair synthesis of the cases [of the Supreme Court and of the D.C. Circuit over the last 25 years] that a statute providing for licensing or other regulation is presumed to permit consideration of antitrust principles, with the harmonizing approach [applied to conflicts between antitrust policies and the agency's other regulatory objectives] • • • unless a contrary intent appears expressly or by necessary implication." (Quotation appears in *Hale* v. *F.C.C.*, D.C. Cir., 425 F. 2d 556, 561 (1970) (concurring opinion)).

Appellant could have applied for the institution of proceedings against the defendants before the Commission and/or the Secretary of Agriculture on the facts alleged

in this case.[13] He could have thereafter petitioned for intervention in any proceedings initiated pursuant to his application.[14] If indeed the allegedly anticompetitive transfer of membership were in violation of Exchange rules, the Commission could have prevented it.

Moreover, the questions here involved are precisely the ones that the Commission and the Secretary are to resolve in fulfilling their watchdog function over the Exchange and its members.[15] The allowance of a private treble damage antitrust suit in this case prior to the attempted

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[13] Title 17, C.F.R. §§ 0.3 and 0.53 provide that "any interested person having any information of any violation of the act" may file an application requesting the institution of proceedings before the Secretary or the Commission, respectively.

[14] Title 17, C.F.R. §§ 0.8, 0.58.

[15] In *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296 (1963), the Court dismissed an antitrust action against defendant carriers who had allegedly agreed not to parallel each other's routes. The Civil Areonautics Board was vested with broad jurisdiction over the air carrier. The Court reasoned at 305:

> "Limitation of routes and divisions of territories and the relation of common carriers to air carriers are basic in this regulatory scheme. The acts charged in this civil suit as antitrust violations are precise ingredients of the Board's authority in granting, qualifying, or denying certificates to air carriers, in modifying, suspending, or revoking them, and in allowing or disallowing affiliations between common carriers and air carriers."

Although the overall regulatory scheme in the instant case is less pervasive than the scheme in *Pan American*, the specific allegations relate directly to the Commission's and the Secretary's power to designate contract markets and allow the trading in futures by individuals. Such power is no less basic to the regulatory scheme than it was in *Pan American*. Also, *compare Far East Conference* v. *United States*, 342 U.S. 570 (1952); *United States Nav. Co.* v. *Cunard S.S. Co.*, 284 U.S. 474 (1932) *with California* v. *F.P.C.*, 369 U.S. 482 (1962); *United States* v. *Borden*

institution of actions before the Commission or the Secretary would discourage "interested persons" from helping the agency fulfill its regulatory function of insuring that contract markets enforce their own rules and bylaws.

Additionally, there is a potential repugnance between a decision of the Commodity Exchange Commission and the award of treble damages in an antitrust action. The 1968 amendments to the Commodity Exchange Act provide the Commission and the Secretary of Agriculture with the discretion to refuse to report "minor violations" of the Act for prosecution "whenever it appears that the public interest does not require such action."[16] The award of damages that are essentially punitive in nature[17] could conflict with a decision by the Commission in the "public interest" that the punitive steps allowable under the Act should not be taken.[18]

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[15] (Continued)
Co., 308 U.S. 188 (1939), for ample illustration of Chief Judge Swygert's observation in *Thill, supra* at 277, that cases on primary jurisdiction provide no clear resolution to the issue.

[16] Title 7, U.S.C.A. § 13c(b) provides:
"§ 13c. • • • minor violations
(b) Nothing in this chapter shall be construed as requiring the Secretary of Agriculture or the commission to report minor violations of this chapter for prosecution, whenever it appears that the public interest does not require such action."

[17] As was said in *Commissioner of Internal Revenue v. Obear-Nester Glass Co.*, 7 Cir., 217 F. 2d 56, 61 (1954), "We might further say that the principal purpose of treble damages seems to be punishment which will deter the violator and others from future illegal acts."

[18] We express no opinion on any antitrust immunity that might result from action or inaction taken by the Commission or the Secretary of Agriculture in this case. The complicated issues of reconciliation of the Commodities Exchange Act and the Sherman Act that would be presented will require the benefit of brief and argument before any determination could be attempted.

We hold, therefore, that before a private treble damage action for antitrust violations may be brought against these defendants charging violation of the rules promulgated as a condition to a contract market designation, the Commodity Exchange Commission and/or the Secretary of Agriculture must have the first opportunity to secure the fulfillment of the statutory duties imposed upon exchanges and their members. The correct remedy in such a case where there is the possibility of a judicial remedy that cannot be granted by the administrative agency is to remand the case to the district court with directions to stay the proceedings until the agency has acted.[19]

Accordingly, we reverse and remand this action to the district court with directions to stay the proceedings until such time as the Commodity Exchange Commission and/or the Secretary of Agriculture may act upon it.

REVERSED AND REMANDED WITH DIRECTIONS

KERNER, *Circuit Judge*, concurring in part and dissenting in part. While I agree that the complaint states a cause of action under the antitrust laws, I do not believe that a remand of this case to the Commission is proper.

Appellant alleges, *inter alia*, that the defendant, Chicago Mercantile Exchange, knowingly conspired with defendant, Siegel Trading Company, to prevent him from continuing as a member of the Exchange and, therefore, from transacting his business. Other allegations in the complaint disclose that incidental to proof of appellant's antitrust claim is the proving of a transference of his membership by the Exchange to James E. Reich. Since this transference allegedly would violate Exchange rules, and thereby the Commodity Exchange Act, if not pursuant to a valid authorization, the majority reasons that Ricci must first proceed before either the Secretary of Agriculture or the Commission.

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[19] *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213, 222-223 (1966); *Pan American World Airways, Inc.* v. *United States*, *supra* at 313, n. 19.

It may be that Ricci could have proceeded before the Commission. However, it does not follow that Ricci *must* proceed before the Commission. The doctrine of primary jurisdiction does not require courts to stay their hand in all controversies which involve factual disputes arguably within the jurisdiction of an administrative agency. Rather, the doctrine holds "that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over." *Far East Conference* v. *United States*, 342 U.S. 570, 574 (1952). The underlying factual questions in the case at bar involve neither unconventional facts nor administrative discretion.[1] Whether Ricci executed a valid authorization binding on him at the time of transfer is a question which a district court is as competent to assess as a commission composed of the Secretary of Agriculture, the Secretary of Commerce and the Attorney General. And, since Congress has made the enforcement of contract market rules mandatory (7 U.S.C. §7a(9)), no question of administrative discretion could arise.

Thill Securities Corp. v. *New York Stock Exchange*, 433 F. 2d 264 (7th Cir. 1970), *cert. denied* 39 U.S. L.W. 3424, heavily relied upon in the majority opinion, presents a much stronger case for the invocation of primary jurisdiction; yet, two of the judges do not mention the doctrine and the third merely suggests the applicability of the doctrine to the district court.

In *Thill*, a licensed securities dealer brought a class action against the New York Stock Exchange charging an unreasonable restraint of trade and an unlawful monopoly of the securities market in violation of the Sherman Antitrust Act[2] and the Clayton Act.[3] The suit was founded

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[1] The Commission does have discretion to refrain from reporting minor violations of its cease and desist orders for prosecution. See discussion *infra*.

[2] Sherman Antitrust Act §§1-2, 15 U.S.C. §§1-2 (1964).

[3] Clayton Act §4, 15 U.S.C. §15 (1964).

on the Exchange's "anti-rebate rule" which prohibits a member from sharing a commission with a non-member even though the non-member originally received the customer's order. The Exchange contended that the "anti-rebate rule" was within the scope of its authorized self-regulatory powers and that the Securities and Exchange Commission was exercising its statutory power of review which explicitly includes the fixing of reasonable rates of commission.[4] Surely, primary jurisdiction was a more appropriate disposition in *Thill* than it is here. *Thill* was (1) a direct antitrust attack on an Exchange rule (2) which involved unconventional facts and (3) statutorily declared administrative discretion.

In addition, Judge Pell noted in his separate opinion "that the very matter in issue is now under consideration by the S.E.C. which on May 28, 1968, announced investigation and public hearings on rate structure matters including economic access to the Exchange market by non-member broker-dealers." (*Supra,* at 278.) Despite this aspect, Judge Pell would have remanded to the district court those antitrust questions which related to the alleged Exchange practice of favoring certain non-members. (*Supra,* at 278.) While Judge Pell dissented from that part of the majority opinion in *Thill* which remanded plaintiff's direct challenge of the "anti-rebate rule" to the district court, he did not do so on the basis of primary jurisdiction. Rather, he felt that "the 'fixing or reasonable rates of commission . . . and other charges' as provided for by §19(b) (9) of the Securities Exchange Act of 1934 (15 U.S.C. §78(s) (b) (9)) necessarily includes as an ancillary power the prohibition of rebates." (*Supra,* at 277.) This is a decision on the merits of the "anti-rebate rule" and, therefore, not relevant to the question of where litigants must seek their remedy. Hence, neither Judge Campbell nor Judge Pell, a majority of the panel in *Thill,* reached a result consistent

[4] 15 U.S.C. §78(s)(b)(9).

with the result reached by the majority today.[5] In fact, the opinions of Judges Pell and Campbell appear to be clear authority against the majority's disposition of the case at bar.

The criteria enumerated by Chief Judge Swygert in his concurring opinion would dictate a remand to the district court in this case.

(1) The SEC's power to weigh antitrust policy in fulfilling its duty of review of Exchange self-regulation.

I assume the majority opinion intends the Commission (Secretaries of Agriculture and Commerce and the Attorney General) to fully decide the issues in this case. Perhaps the very incongruence of these officials deciding difficult antitrust questions is enough to suggest that Congress did not legislate such a result.[6] However, the resolution of this question need not rest on such grounds. Congress has strictly limited the jurisdiction of the Secretary of Agriculture and the Commission to violations "of the provisions of this chapter." (See e.g., Title 7, U.S.C. §13a.) This chapter means the "Commodity Exchange Act" (Title 7, U.S.C. §1) and not the "Sherman Act," which is found at 15 U.S.C. §1.

Furthermore, there is no provision in the Commodity Exchange Act which suggests that the Commission should

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[5] Evidently, Judge Pell believed the New York Stock Exchange is exempt from suits which are direct challenges to its rules. Since Judge Pell concurred in that part of Judge Campbell's opinion which remanded the remaining issues to the district court, he must have concluded that primary jurisdiction was inappropriate.

[6] I merely observe that antitrust law is not within the peculiar province of the Secretaries of Agriculture and Commerce. Of course, quite the opposite is true of the Attorney General who is the chief enforcement officer of the antitrust laws and who could possibly be placed in an inconsistent position in having to judge those suits.

regulate these types of competitive factors in contract markets. This is in contrast with SEC statutory authority to review "reasonable rates of commission" which arguably includes such factors. Yet Judge Swygert did not believe that this statutorily granted power of review in the SEC meant, *ipso facto*, that the SEC had the power to consider these factors.[7] Instead, Judge Swygert suggested that the district court consider the question. This careful approach by Judge Swygert is not adopted by the majority although Commission authority to consider antitrust law is, at the least, arguable.

(2) The ability of an aggrieved party to initiate SEC review.

It is reasonably clear that appellant could have applied for the institution of proceedings before the Commission and/or the Secretary of Agriculture and thereafter petitioned for intervention. By regulation, intervention is permitted[8] upon a showing of (a) the petitioner's relationship to the matters involved in the proceeding; (b) the nature of the material he intends to present in evidence; (c) the nature of the argument he intends to make; and (d) any other reason he should be allowed to intervene.

These factors indicate that both the Commission and the Secretary of Agriculture possess the power to exclude claimants based on the nature of their claims. Since institution of proceedings is permitted only when there is reason to believe there has been a violation,[9] Ricci might be

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[7] "Cases concerning primary jurisdiction of other administrative agencies to consider antitrust matters do not provide clear guidance for resolution of this question. Compare, *Pan American World Airlines, Inc.* v. *United States,* 371 U.S. 296, 83 S. Ct. 476, 9 L. Ed. 2d 325 (1963); *California* v. *F.P.C.,* 369 U.S. 482, 82 S. Ct. 901, 8 L. Ed. 2d 54 (1962)." (Concurring opinion of Chief Judge Swygert at p. 277.)

[8] Title 17, C.F.R. §0.8, 0.58.

[9] Title 17, C.F.R. §0.3, 0.53. Thus, Ricci may be limited to proof of a Rules violation.

prevented from asserting his antitrust action before the Commission. Ricci would then return to the district court on his antitrust claim, needlessly multiplying the number of tribunals involved in these proceedings. Of course, this question could be answered, as it was in *Thill*, by a remand to the district court for the taking of evidence.

(3) The extent that SEC expertise would be useful in resolving the question of whether the anti-rebate rule was necessary to make the Securities Exchange Act work.[10]

Seemingly, the relevance of this factor is extremely limited in this case. Ricci has alleged and must prove facts which show an unlawful conspiracy between the Exchange and Siegel Trading Company. A good faith but erroneous decision by the Exchange would not be a violation of the Sherman Act. The power to decide membership requirements implies the power to make good faith but erroneous decisions. Such power is needed to make the Exchange Act Work. *Silver* v. *N.Y.S.E.*, 373 U.S. 341, 357. Since Ricci did not allege that a good faith decision by the Exchange to transfer his membership was a violation of the antitrust laws, the question under (3) is whether it is necessary to make the Act work for the Exchange to possess power to determine its membership if these determinations are motivated by otherwise unlawful intent. This is traditional "rule of reason" inquiry which the Court in *Silver* described as "flexible enough to permit the Exchange sufficient breathing space. . . ." (*Supra* at 360.) Whether the Exchange should be insulated from this type of antitrust liability will be considered in the following section. All that remains to be mentioned here is that a district court would have greater expertise and experience in this regard than the Commission. Judge Campbell so held in *Thill*:

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[10] This assumes that the Secretary and/or the Commission have the power to consider antitrust claims. Since the question of primary jurisdiction was neither briefed nor argued orally, we are somewhat inhibited in our analysis.

> It is in this area of public protection that the SEC claim their expertise. On the other hand, it should be remembered that the courts of the United States have over the years become the repository of antitrust expertise. (433 F. 2d at 273.)

Whatever the validity of this holding with regard to the "anti-rebate rule," it is doubtless true here where the technical complexities do not approach those present in *Thill*.

(4) The possibility of achieving the aims of the Sherman Act without subjecting exchanges to treble damage suits.

I would think that the aims of the Sherman Act could only be achieved by enforcing that Act against Exchanges which make unlawful transfers of membership for anti-competitive reasons. Perhaps the nature of the action in *Thill* presents a more difficult question; however, I am able to think of no legitimate public policy goals which are advanced by insulating this Exchange from antitrust liability given the conduct alleged in the complaint. The majority opinion indicates none. Yet, the opinion intimates that because of a "potential repugnance between a decision of the Commodity Exchange Commission and the award of treble damages in an antitrust action" (*infra* at p. 11), the aims of the Sherman Act should be subordinated to the aims of the Commodity Exchange Act. This "potential repugnance" stems from Commission discretion to refuse to report minor violations of its cease and desist orders.[11] Apparently the majority would permit the Commission, which does not have jurisdiction to consider the question of damages, to foreclose private suits if such foreclosure were deemed in the public interest.

This reconciliation of the Commodities Exchange Act and the Sherman Act is not consistent with prior Supreme Court decisions on the subject. *United States* v. *Philadel-*

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[11] 7 U.S.C. §13(b).

phia National Bank, 374 U.S. 321, 351 (1963); *United States* v. *Borden*, 308 U.S. 188, 198-200 (1939). Significantly, there is no statutory standard or detailed economic regulation to guide the Commission in making its "public interest" determination. *United States* v. *Philadelphia National Bank, supra; California* v. *Federal Power Com'n*, 369 U.S. 482, 484-85, 487-88 (1962). In fact, there is no suggestion that the Commission has ever considered, or desires to consider, the economic impact of its decisions. This is not true either of the FPC or the Comptroller of the Currency. *United States* v. *Philadelphia National Bank, supra; California* v. *Federal Power Com'n, supra.* Yet, these bodies do not possess the kind of power the majority would confer on the Commodity Exchange Commission.

Moreover, there is no "potential repugnance" between the Commodity Exchange Act and the Sherman Act. All Congress has done by granting the Commission the aforementioned discretion is to allow the Commission the traditional freedom available to any public prosecutor. It is a cardinal principal of legislative interpretation to construe away from inconsistencies. Here such a construction is not only unstrained, but also the natural meaning to be given the words used. Faced with this situation, a court should not create inconsistencies and then purport to reconcile them.

For the foregoing reasons, I believe the proper disposition of this case is a remand to the district for further proceedings.

For the Seventh Circuit
Chicago, Illinois 60604
TUESDAY, OCTOBER 5, 1971
Before

Hon. LUTHER M. SWYGERT, *Chief Judge*
Hon. ROGER J. KILEY, *Circuit Judge*
Hon. THOMAS E. FAIRCHILD, *Circuit Judge*
Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. OTTO KERNER, *Circuit Judge*
Hon. WILBUR F. PELL, JR., *Circuit Judge*
Hon. JOHN PAUL STEVENS, *Circuit Judge*
Hon. ROBERT A. SPRECHER, *Circuit Judge*

THOMAS RICCI,
Plaintiff-Appellant,
No. 18222
v.
CHICAGO MERCANTILE EXCHANGE, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

On consideration of the petition for rehearing and suggestion that it be heard *en banc* filed in the above-entitled cause, and the answers of opposing counsel in response thereto, a vote of the active members of the court was requested, and all members of the panel having voted to deny a petition for rehearing, and a majority of the active members having voted to deny a rehearing *en banc,*

IT IS ORDERED that the petition for rehearing and the petition for rehearing *en banc* be, and the same are hereby denied.

Judge Stevens voted to grant the petition for rehearing *en banc.*

No. 71-858

FEB 3 1972

E. ROBERT SEAVER, CLE

In the

Supreme Court of the United States

OCTOBER TERM, 1971

THOMAS RICCI,

Petitioner,

vs.

CHICAGO MERCANTILE EXCHANGE, an Illinois not-for-profit corporation, EVERETTE B. HARRIS, WILLIAM PHELAN, LEO MELAMED, THE SIEGEL TRADING COMPANY, a corporation, and JOSEPH SIEGEL,

Respondents.

RESPONSE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-858

THOMAS RICCI,

Petitioner,

vs.

CHICAGO MERCANTILE EXCHANGE, an Illinois not-for-profit corporation, EVERETTE B. HARRIS, WILLIAM PHELAN, LEO MELAMED, THE SIEGEL TRADING COMPANY, a corporation, and JOSEPH SIEGEL,

Respondents.

RESPONSE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

QUESTION PRESENTED

Did the Court of Appeals correctly stay proceedings pending determination of certain issues by the Commodity Exchange Commission.

STATEMENT OF THE CASE

A. Nature and Course of Proceedings

On May 14, 1969, plaintiff filed a six count complaint against the Chicago Mercantile Exchange ("CME"), three

of its officers ("Exchange defendants") and The Siegel Trading Company and its president Joseph E. Siegel (collectively "Siegel"). Counts I, III and V[1] charge that Siegel induced the CME to transfer plaintiff's CME membership to a third party and that in effecting such transfer, the CME failed to enforce and obey its own rules "relating as to membership, financial structure and policing of its members" and the "rules and regulations of the Commodity Exchange Act . . . ." (Compl. ¶ 19) Plaintiff also alleges that the transfer of his membership resulted from a conspiracy between the CME and Siegel. For relief, plaintiff sought avoidance of the transfer of his membership and certain damages.

The CME and its officers moved to dismiss; however, before the motion was heard, discovery was pursued including two depositions of plaintiff[2] and one of defendant Melamed. Briefly, the facts as admitted by plaintiff and as presented to the district court in support of the CME's motion were:

In May of 1967, Siegel purchased an Exchange membership for $15,000 and registered it in plaintiff's name. Plaintiff, who was then Siegel's employee, claims that the $15,000 was lent to him but admits that he never had possession of the funds, that he did not participate in the purchase and that he was not required to give evidence of or secure the debt (II Ricci 17-21).

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[1] Counts II, IV and VI charge tortious interference with advantageous commercial relationships and were before the district court on a claim of pendent jurisdiction.

[2] On June 19, 1969, the Exchange defendants took plaintiff's deposition (cited herein as "I Ricci"). On July 24 and August 1, 1969, Siegel took plaintiff's deposition (respectively cited herein as "II Ricci" and "III Ricci"). The transcripts are part of the Record on Appeal.

On October 24, 1967, plaintiff signed and gave to Siegel an Authorization in the following form (I Ricci 16, Ricci Dep. Ex. 1):

> *"Authorization to Transfer Membership*
>
> To the President of the
> Chicago Mercantile Exchange
>
> I hereby authorize you to transfer my membership in the Chicago Mercantile Exchange to ..... upon receipt from him of the purchase price of $....., which is to be paid to THE SIEGEL TRADING CO., INC. in accordance with Rule 307.
>
> It is understood that the purchaser shall pay the transfer fee and that I shall pay all dues and assessments up to the end of the six-month period in [sic] my membership is sold.
>
> /s/ Thomas Ricci
>
> Date *Oct. 24, 1967*"

A controversy arose between plaintiff and Siegel (II Ricci 44, 54-57) and, on February 11, 1969, an attorney attempted to revoke plaintiff's Authorization (Pl. Ex. 1).

On February 17, 1969, plaintiff and Siegel appeared before the CME's Board of Governors to resolve the disputed claims to the membership (I Ricci 45). The Board suggested arbitration (I Ricci 47). Both agreed to arbitration under CME rules [3] but on February 24, 1969, plaintiff repudiated his agreement to arbitrate (I Ricci 71-73; Ricci Dep. Exs. 3, 8).

Subsequently, Siegel presented plaintiff's Authorization to Transfer Membership and demanded transfer. The CME acted on such Authorization but *simultaneously* approved

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[3] CME Rules 500 through 512 adopted in 1963, as amended, governed arbitration between members.

a transfer of another membership to plaintiff. There was no gap in plaintiff's membership (I Ricci 61-62; II Ricci 105; III Ricci 61).

The district court ruled in favor of the CME, failing, however, to indicate whether the submission of matter outside the pleadings by both sides converted the motion to dismiss into a motion for summary judgment under Federal Rule of Civil Procedure 56.

The Court of Appeals ruled that the motion had not been treated as a motion for summary judgment and reversed with directions to stay proceedings "until such time as the Commodity Exchange Commission . . . may act upon it."

B. Facts Pertinent to The Commodity Exchange Commission's Primary Jurisdiction

The CME is a "board of trade" as defined in Section 2(a) of the Commodity Exchange Act ("Act" or "C.E.A."), U.S.C. § 1 *et seq.* It has been designated by the Secretary of Agriculture as a "contract market." Such designation is a prerequisite to futures trading.

As conditions for designation and continued operation as a contract market, the CME is required to:

> "Enforce all . . . rules . . . made or issued by it . . . which relate to terms and conditions in contracts of sale to be executed on or subject to the rules of such contract market or relate to other *trading requirements*, and which have not been disapproved by the Secretary of Agriculture . . .;" (C.E.A. § 5a(8)) (emphasis supplied)
>
> "Enforce all . . . rules . . . which provide minimum financial standards and related reporting requirements . . . ." (C.E.A. § 5a(9))

Regulatory control of the CME and its members has been delegated by Congress to the Secretary of Agriculture and to the Commodity Exchange Commission ("CEC" or "Commission"), consisting of the Secretary of Agriculture, the Secretary of Commerce and the Attorney General. More particularly, section 6(a) grants jurisdiction to the Commission to insure that the CME complies with its duty of self regulation:

> "The Commission is authorized to suspend for a period not to exceed six months or to revoke the designation of any board of trade as a 'contract market' upon a showing that such board of trade is not enforcing or has not enforced its rules of government made a condition of its designation as set forth in section 5 of this Act or that such board of trade, or any director, officer, agent, or employee thereof, otherwise is violating or has violated any of the provisions of this Act or any of the rules, regulations, or orders of the Secretary of Agriculture or the Commission thereunder."

In addition, the Commission is empowered to issue cease and desist orders against a contract market directing that it obviate any failure to enforce its rules of government or any violation of the Act. (C.E.A. § 6b)

Suspension, revocation and cease and desist proceedings are subject to judicial review by the appellate court for the circuit in which the contract market has its principal place of business. (C.E.A. § 6(a))

The Commission is authorized to report certain violations of the Act for criminal prosecution and is also given the concomitant power to refuse "to report minor violations of the Act for prosecution, whenever it appears that the public interest does not require such action." (C.E.A. § 13(b))

ARGUMENT

I.

PETITIONER'S "JUSTIFICATION" FOR THE GRANT OF THE WRIT IS BASED ON A MISCONCEPTION OF THE OPINION BELOW

Petitioner's principal contention in support of his application is that the decision below "placed an important area of the national economy (*i.e.*, agriculture commodities) outside the scope of effective antitrust enforcement." Obviously, the petitioner misconstrues the holding and effect of the opinion. The Court of Appeals did not hold that the Commission had exclusive jurisdiction or that commodity exchanges were exempt from the antitrust laws.

Instead, the Court of Appeals held that petitioner must, in the first instance, bring his charges that the CME refused to enforce or violated its own rules and the provisions of the Commodity Exchange Act to the attention of the CEC.

II.

EXERCISE OF JURISDICTION BY THE CEC WILL MATERIALLY AID ULTIMATE JUDICIAL RESOLUTION OF ISSUES WITHIN THE CEC'S SPHERE OF CONTINUING RESPONSIBILITY AND EXPERTISE.

Broadly, plaintiff alleged that Siegel and the Exchange defendants conspired to deprive plaintiff of his membership in and trading privileges on the CME. The particulars of plaintiff's charge are that the CME violated or refused to enforce its rules relating to transfers of memberships, qualifications to trade, fees and financial requirements. In addition, the Exchange defendants allegedly honored plain-

tiff's signed Authorization to Transfer Membership in the face of a purported revocation.

The touchstone of the Court of Appeals' opinion was that the lawfulness of the Exchange's conduct must be judged in light of "any justification from the Exchange's status as a board of trade and a designated 'contract market.'" The *justification* issue obviously depends on whether the CME here acted pursuant to lawfully adopted rules (which the Act requires be enforced) or whether, in the absence of relevant rules, it acted in a manner both necessary and proper to comply with and achieve the goals of the Act.

Plaintiff's mere assertion of a conspiracy between the CME and Siegel is without relevance to the issue of the CEC's primary jurisdiction. The conduct characterized by plaintiff as a conspiracy is characterized by the CME as an investigation for the purpose of enforcing its rules. The question whether an unlawful conspiracy occurred is simply another issue properly submitted to the CEC.

The only question decided by the Court of Appeals was whether the initial determination of justification under the Act ought to be made by a federal district court or by the CEC, subject to judicial review as explicitly set forth at section 6(a) of the Act. Precedent and logic firmly support the Court of Appeals' conclusion that the initial findings ought to be made by the CEC.

A. Compliance with Rules and Regulations.

The administration of the Commodity Exchange Act largely depends on the delegation to the various contract markets of the day-to-day supervision and control of commodity traders and commodity trading. Delegation of au-

thority to and consequent self regulation by commodity exchanges is clearly in accord with the congressional purpose expressed in and underlying the Act.

For example, as a condition of its designation as a contract market, the CME was required to adopt and enforce rules regulating the financial stability and qualifications to trade of its members. Failure to enforce such rules subjects the CME to revocation of its designation, injunctions and criminal fines and penalties. Subject to judicial review by the Court of Appeals for the Seventh Circuit, the CEC is granted jurisdiction to insure enforcement of the CME's rules and compliance with the Act (C. E. A. §§ 6(a), 6b)

In this instance, the CEC would first determine whether the rules that the CME relies upon to justify its actions were properly and validly adopted. Next, the CEC would determine whether such rules were enforced in accordance with their own terms and, more importantly, enforced so as to further the goals of the Act. If both determinations were positive, then its factual decisions would be final, subject to review by the Court of Appeals on the ground that such findings were "unsupported by the weight of evidence."

As was said by the court in *Minneapolis Grain Exchange* v. *Farmers Union Grain Terminal Ass'n*, 75 F. Supp. 577, 581-582 (D. Minn. 1947):

> "Congress has already indicated that the Commodity Exchange Commission not only must approve plaintiff's rules, but should have jurisdiction over enforcement of its rules. . . . In the case at bar, factual matters apparently would have to be tried by this Court in order to determine whether the defendants have violated plaintiff's rules, and matters which may vitally affect the uniformity of the policy of the Commission in that regard may be involved. The intervention of this

Court in assuming jurisdiction may give rise to an unfortunate conflict between the rulings of this Court on factual questions and those made by an administrative agency which is expressly clothed by Congress with jurisdiction to determine such a controversy."

B. Other CME Activities.

Plaintiff alleges, in addition to the foregoing rule violations, that the CME refused to accept a purported revocation of plaintiff's signed Authorization to Transfer Membership and instead transferred plaintiff's membership on presentation of such Authorization. In this, the CME was acting in an area, the regulation of "trading requirements," necessarily delegated to it under the Act. For present purposes, it may be assumed that no CME rule explicitly governed this rather unusual situation.

The CME's dilemma is apparent. By reason of the statutory and regulatory scheme, it was required to take responsibility for determining the ownership of one of its memberships. No rule resolved the dispute and the CME was forced to make an *ad hoc* determination.

The question is whether that *ad hoc* determination was justified by the statutory and regulatory scheme under which the CME operated and whether, therefore, the CME ought to be excused from civil liability. The determination of justification demands a comprehensive overview of the statutory purposes served by the delegation of authority to exchanges and of the probable future effect of approval or disapproval of the CME's action on the relations between exchanges and their members. The CEC is obviously more qualified than a district court to judge the CME's actions, especially in light of the necessity of harmonizing the prospective effects of such judgment with the ongoing administration of the Commodity Exchange Act.

III.

RESPONSE TO PLAINTIFF'S ARGUMENTS

Plaintiff puts forth six arguments against the invocation of the doctrine of primary jurisdiction.

A. Pervasive Regulatory Scheme.

Plaintiff argues that the scheme of regulation is not "pervasive" and therefore that the court need not defer to the agency's jurisdiction. Plaintiff is wrong, both on his facts and on his law.

On the facts, the regulatory scheme of the Commodity Exchange Act, insofar as it relates to exchange rules and their enforcement, meets every definitional test for pervasiveness. Regulation starts at the moment a commodity exchange seeks designation as a contract market and continues so long as the designation is not revoked. The CME submitted all rules and amendments to the Secretary of Agriculture subject to his disapproval (§ 8a(7)). All subsequent enforcement proceedings were reported to the Secretary and records of them maintained on file for inspection (§ 5a(1), (2)).

The cases cited by plaintiff to demonstrate the lack of pervasiveness here are wholly inapposite. *United States* v. *Radio Corporation of America,* 358 U.S. 334 (1959) and *McKeon Construction Co.* v. *McClatchy Newspapers,* 1970 CCH Trade Cases ¶ 73,212 (N.D. Cal. 1969) relate to the issue of repeal by implications of the antitrust laws and not primary jurisdiction, as is eloquently clear from the fact that in both cases the administrative agency had passed on the matters in suit prior to judicial action.

In *California* v. *Federal Power Commission,* 369 U.S. 482 (1962), hearings before the FPC were stayed to allow judi-

cial action to proceed on the ground that the administrative action would be futile if the court disallowed a merger. In this case there is no similar question of administrative futility since the issue of justification may properly be decided by the CEC.

The court in *Denver Union Stockyards Co.* v. *Denver Live Stock Commission Co.*, 404 F.2d 1055 (10th Cir. 1968), *cert. denied*, 394 U.S. 1014 (1969), refused to stay a federal antitrust action relating to the industry regulated by the Packers and Stockyards Act, 7 U.S.C. § 181 et seq. The complaint there charged monopolization in violation of section 2 of the Sherman Act and acquisition in violation of section 7 of the Clayton Act. The court found:

> "Nothing in the Packers and Stockyards Act immunizes or exempts those subject to its provisions from antitrust actions. To the contrary, it provides that nothing contained therein shall 'prevent or interfere with the enforcement of, or the procedure under,' the Sherman Act and the Clayton Act. *The Secretary is given no power over acquisitions and mergers.* Those regulated may abandon their activities without agency approval. In our opinion, the Act is not of the pervasive character which, when found in other acts, has resulted in the invocation of the primary jurisdiction doctrine. The determination of whether the charged antitrust violations have occurred does not require administrative expertise and court action will not impair or interfere with the coherence or uniformity of an intricate administrative program." 404 F.2d at 1059 (emphasis supplied, footnotes omitted).

Obviously that case is no authority here where the administrative agency does have authority to deal with the actual conduct complained of and where the administrative agency has the power to determine whether the CME's rules were justified and properly enforced.

B. Arguable Lawfulness.

Plaintiff urges that the defendants' conduct here was not arguably lawful and that it would, therefore, be fruitless to refer the matter to an administrative agency for the exercise of its primary jurisdiction. Whatever the merit of the principle, it is clearly inapplicable here.

Plaintiff's argument is based on the simplistic notion that the "arguable lawfulness" of defendants' conduct must be judged on the basis of the complaint. The argument is absurd since complaints are routinely drafted to allege illegal conduct without reference to defenses, immunities or justifications.

In order to determine the applicability of the doctrine, one must look more deeply into the record. In this case, one finds that each of the material allegations of the complaint are contradicted by plaintiff's admissions.

C. Immunization.

Plaintiff's bare statement that a case may not be stayed pending the exercise of primary jurisdiction unless the administrative agency to which the matter is referred is empowered to immunize the conduct from the antitrust laws is both unsupported and unsupportable. Instead, the primary jurisdiction doctrine is founded on the need for uniformity, application of administrative skills and the need to avoid the possibility of conflict between the courts and the responsible administrative agency.

D. Uniformity of Policy.

Plaintiff fails to consider that all of the regulated commodity exchanges have been required, as a condition of designation, to adopt rules similar to the CME rules. At

stake here is the uniformity of the enforcement policy that will be pursued by these exchanges. Moreover, even the enforcement policy of a single exchange is threatened if it is subject to varying standards applied by different district courts.

The ultimate determination of whether a commodity exchange has fulfilled its duty in the adoption and enforcement of rules requires striking a delicate balance to create a climate in which commodity exchanges, bearing the burden and responsibility of self regulation, are encouraged to act (unstifled by the threat of constant harassing lawsuits) and yet are not above answering for their derelictions. The CEC, which is charged with maintaining this balance, must have the power to make the initial judgment regarding the adequacy of an exchange's performance since such judgment will necessarily create standards of conduct applicable to all areas in which the exchange is responsible for the regulation of its members' conduct.

For example, in this case, the CEC would make a general determination regarding the duty of an exchange to act in a matter where no specific rule governed, but which was within an area delegated to the supervision of the exchange. Moreover, the CEC's determination would create standards for judging the appropriateness of such action. Such standards would have obvious prospective application and effect.

In the interests of uniformity, such standards ought to be left to the hands of a single responsible agency, the CEC.

E. Power to Grant Relief.

The CEC's inability to grant plaintiff treble damages is no bar to its exercise of primary jurisdiction. First, the

plaintiff seeks an order voiding the transfer of his membership and restoration of that membership to him. The CEC has power to issue such an order if it finds that the CME failed to comply with its rules in effecting the transfer (C.E.A. § 6b).

Second, there is no sound authority limiting the application of the primary jurisdiction doctrine to instances where the agency has power to afford all the relief that might be sought. *Thill Securities Corp.* v. *New York Stock Exchange*, 433 F.2d 264, 278 (7th Cir. 1970) (concurring opinion), *cert. denied*, 28 L. Ed. 2d 532 (1971).

In *S. S. W., Inc.* v. *Air Transport Ass'n.*, 191 F.2d 658 (D.C. Cir. 1951), the court recognized that where plaintiff sought treble damages under the antitrust laws, a remedy unavailable before the CAB, the proper procedure was:

> "We think accommodation of the two statutes and of the remedial provisions thereof can best be accomplished as follows: The District Court should retain jurisdiction of the antitrust suit while appellant seeks his remedies from the Board. This is consistent with General American Tank Car Corp. v. El Dorado Terminal Co., 1940, 308 U. S. 422, 433, 60 St. Ct. 325, 84 L. Ed. 361, in which the Court said, 'When it appeared in the course of the litigation that an administrative problem, committed to the Commission, was involved, the court should have stayed its hand pending the Commission's determination of the lawfulness and reasonableness of the practices under the terms of the Act. There should not be a dismissal, but * * * the cause should be held pending the conclusion of an appropriate administrative proceeding.' The proceedings before the Board will result in a determination by it of the extent of its jurisdiction over the subject matter. In addition, they will produce a record, findings of fact

and conclusions of law as to whether the specific practices complained of are legal or illegal under the Civil Aeronautics Act—all of which will be subject to judicial review under that Act. The District Court, which will meanwhile have retained jurisdiction of the antitrust suit, will have the benefit of these proceedings in determining the issue of antitrust violation. Whatever damages might ultimately be awarded by it would be damages for violation of the antitrust laws, not the Civil Aeronautics Act. Similarly, whatever injunctive relief is ultimately granted by the District Court with regard to matters determined by the Board to fall outside its jurisdiction would be under the antitrust laws, not the Civil Aeronautics Act." 191 F.2d at 664. (footnotes omitted.)

F. Agency Expertise.

Plaintiff asserts that the CEC has no useful expertise, but that assertion is based on the assumption that the only question here in issue is whether there was a group boycott.

To the contrary, as recognized by this Court, there are several issues as to which the CEC's expertise is essential. For example: Were the rules relied upon to justify the CME's action lawfully adopted and enforced? Were the CME's actions otherwise consistent with its rules and with the Act? And, did plaintiff comply with all relevant CME rules?

CONCLUSION

For the foregoing reasons, defendants respectfully pray that the Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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Dated: February 2, 1972

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-858

THOMAS RICCI, PETITIONER

v.

CHICAGO MERCANTILE EXCHANGE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

STATEMENT

Petitioner seeks review of a decision of the court of appeals holding that certain issues in petitioner's private treble damage antitrust action must, under the doctrine of primary jurisdiction, first be considered by the Commodity Exchange Commission or the Secretary of Agriculture.

Petitioner brought this suit against the Chicago Mercantile Exchange, three of its officers, Siegel Trad-

ing Co., a member firm of the Exchange, and the president of Siegel Trading (all respondents herein) to recover damages petitioner allegedly suffered from cancellation of his membership and trading privileges in the Exchange. The complaint alleged that respondents had violated Section 1 of the Sherman Act [1] by conspiring to prevent petitioner from maintaining his membership in the Exchange and had transferred his membership in violation of the rules of the Exchange (App. 5-20).[2] Specifically, it alleged that Siegel induced the Exchange to transfer petitioner's membership to a third party by use of a blank authorization to transfer membership that petitioner had executed but subsequently had revoked.[3] The transfer allegedly took place without notice and hearing, and without consideration of petitioner's claim, known to the Exchange, that a debt he owed to Siegel was more than offset by a debt owed by Siegel to petitioner. As a result, petitioner alleged, he was unable to conduct his business until he purchased a new membership in the Exchange.

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[1] The complaint also alleged tortious interference with advantageous commercial relationships in violation of state law.

[2] "App." refers to the appendix in the court of appeals.

[3] Exchange Rule 307 states that a membership can be transferred or sold only when the member signs an authorization to transfer. If the transfer of petitioner's membership was invalid, then he was also improperly denied trading privileges on the Exchange in violation of Rule 322. Paragraph 10 of the complaint sets forth the rules of the Exchange involved here (App. 7-9). The rules have been recently renumbered, but there do not appear to have been any substantial changes.

The district court dismissed the complaint for failure to state a cause of action under Section 1 of the Sherman Act (Pet. App. 4a). The court of appeals reversed, holding that "absent any justification from the Exchange's status as a board of trade and a designated 'contract market,' the complaint is sufficient to allege a group boycott, a *per se* violation of section 1 of the Sherman Act." (Pet. App. 10a).

The court held, however, with one dissent, that under the doctrine of primary jurisdiction the antitrust proceedings should be stayed until the Commodity Exchange Commission or the Secretary of Agriculture passed on the validity of the defendants' conduct under the rules of the Exchange and the Commodity Exchange Act, 7 U.S.C. 1, *et seq.* (Pet. App. 10a-18a). The majority found that the facts alleged in the complaint in support of the antitrust charge also constituted violations of Exchange rules which could be investigated by the Commission or the Secretary of Agriculture (Pet. App. 14a).

The dissent noted that although the Commission and the Secretary could determine whether there had been violations of the Exchange rules, they had no jurisdiction to decide antitrust issues. It also stated that the district court was just as competent as they were to resolve the factual question involved in the antitrust complaint (Pet. App. 18a-25a).

INTEREST OF THE UNITED STATES

This case raises an important question concerning the proper scope of the doctrine of primary jurisdiction in antitrust cases. Because of its responsibility

for the enforcement of the antitrust laws, the United States is interested in maintaining the proper division of responsibility between regulatory agencies and the federal courts in the antitrust area.

The issue presented here is important with respect to the application of the antitrust laws both to commodities trading and to other industries subject to less than comprehensive regulation by administrative agencies. In 1971, there were almost 12 million commodity futures transactions involving an estimated $123.7 billion.[4] These transactions form an essential part of the nation's distribution system of agricultural products. Moreover, there are a number of cases pending in the lower federal courts, including one filed by the United States, in which antitrust claims have been raised concerning practices in the commodities trading industry.[5]

DISCUSSION

The antitrust laws are the primary vehicle for promoting a free market economy and regulating practices which restrain competition. Congress also has enacted numerous statutes granting varying degrees of authority to administrative agencies to regulate certain practices in the public interest. When an anti-

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[4] U.S. Department of Agriculture, Release No. 4297-71, December 29, 1971.

[5] These cases include *United States* v. *Board of Trade of City of Chicago* (N.D. Ill., No. 71 C 2875); *Arenson* v. *Chicago Mercantile Exchange* (N.D. Ill., No. 71 C 854); *Arenson* v. *Board of Trade of the City of Chicago* (N.D. Ill., No. 71 C 855).

trust suit challenges activities which are subject to the regulatory authority of an agency, the question often arises whether the district court or the agency has primary jurisdiction over the issues involved. Under principles established by this Court, the district courts should defer to regulatory agencies in antitrust cases only where Congress has given the agency such comprehensive regulatory authority, including either the power to grant exemptions from the antitrust laws or the power to remedy antitrust violations, that it may be deemed to that extent to have supplanted the normal operation of the antitrust laws.

The decision below is at variance with these principles. The court below held that the Commodity Exchange Commission and the Secretary of Agriculture must be given an opportunity to determine whether the facts alleged in petitioner's complaint established violations of the Commodity Exchange Act or the rules of the Chicago Mercantile Exchange, before the district court could consider petitioner's antitrust contentions. This holding failed to focus on the critical question—whether the Act provides a sufficiently comprehensive regulatory scheme to warrant application of the doctrine of primary jurisdiction.

1. The doctrine of primary jurisdiction "requires judicial abstention in cases where protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme" (*United States* v. *Philadelphia National Bank*, 374 U.S. 321, 353). The doctrine originated in railroad rate cases, where an initial judicial determination of the reasonableness of a particular rate would have

interfered with the statutory scheme under which the Interstate Commerce Commission had been given specific authority to determine the question. *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426; see, also, *United States* v. *Western Pacific R.*, 352 U.S. 59. In the antitrust field, however, the doctrine has been applied only where there is a comprehensive regulatory scheme under which the administrative agency is authorized to decide the issues involved in the antitrust suit and application of the antitrust laws might frustrate Congress' intent to substitute pervasive agency regulation for the operation of free market forces. See *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 351-354; *United States* v. *Radio Corp. of America*, 358 U.S. 334, 346-350. The application of the doctrine of primary jurisdiction in antitrust cases is thus limited "lest the antitrust policy whose enforcement Congress in this situation has entrusted to the courts is in practical effect taken over by * * * [the regulatory] agencies" (*California* v. *Federal Power Commission*, 369 U.S. 482, 490).

These decisions also show that, contrary to the thinking of the court of appeals in this case, the doctrine is not to be applied merely because the facts involved in an antitrust suit also relate to issues that are subject to a regulatory agency's jurisdiction. The critical question is not whether the agency has jurisdiction to deal with some of the problems posed by the facts in the antitrust case, but whether the agency's regulatory authority is so comprehensive that permitting the district court to decide the antitrust case would create a serious possibility of con-

flict with the proper exercise of the agency's function in administering the regulatory scheme that Congress directed it to apply.

2. There is neither a sufficiently comprehensive regulatory scheme involved in this case nor a sufficient possibility of conflict between that scheme and the antitrust suit to justify the staying of the district court proceeding until the agencies involved have had the opportunity to consider the matter. The statute involved, the Commodities Exchange Act, does not provide a pervasive regulatory scheme for the commodities trading business but rather was designed narrowly to deal with specific evils. In enacting that statute, Congress noted the large volume and economic importance of commodity transactions and found that such transactions are susceptible to speculation, manipulation, and control, with sudden or unreasonable fluctuations in the prices of commodities on boards of trade frequently occurring as a result. 7 U.S.C. 5. Accordingly, Congress decided to provide limited regulation to protect the national interest in commodity transactions (*ibid.*). See *Chicago Board of Trade* v. *Olsen*, 262 U.S. 1.

To qualify under the Act to engage in the trading of commodity futures, a board of trade must register as a "contract market" with the Secretary of Agriculture, must file required reports with the Secretary and must provide rules "for the prevention of manipulation of prices and the cornering of any commodity by the dealers or operators" on the market. 7 U.S.C. 7(d). The Secretary has authority to disapprove a rule adopted by a board of trade, but such authority is

limited to instances where the rule violates the Commodity Exchange Act or any rule, regulation or order promulgated thereunder. 7 U.S.C. 12a(7). The Act specifically prohibits certain types of practices, deemed adverse to the public interest. 7 U.S.C. 6b, 6c. In addition, commodity brokers are required to register with the Secretary and to maintain minimum capital requirements; the Secretary can suspend or revoke the registration of a broker who violates the Act or any rules of the Secretary. 7 U.S.C. 6f(2).

The Act also creates the Commodity Exchange Commission, which consists of the Secretary of Agriculture, the Secretary of Commerce, and the Attorney General (or their representatives). 7 U.S.C. 2. The Commission is authorized to administer and enforce certain of the standards embodied in the Act (see, *e.g.*, 17 C.F.R. 1.20-1.39), and may conduct disciplinary proceedings for violations of the Act or of rules and regulations promulgated thereunder. 17 C.F.R. 0.50-0.96.

The scheme that Congress provided in the Commodities Exchange Act is not the kind of comprehensive regulatory system that would make it appropriate for the courts in antitrust cases to defer to the expert judgment of either the Commission or the Secretary of Agriculture. Neither the Commission nor the Secretary has any general authority to proceed against unfair methods of competition or otherwise to grant relief against antitrust violations; they have no authority to determine who can do business in the commodities markets, the prices to be charged, or the establishment of new markets. Their jurisdiction is

limited to dealing with the precise trading practices specified in the Act; that is the only area in which they have experience or expertise. In contrast, "the courts of the United States have over the years become the repository of antitrust expertise" (*Thill Securities Corp.* v. *New York Stock Exchange*, 433 F. 2d 264, 273 (C.A. 7), certiorari denied, 401 U.S. 994.

The only issues either the Commission or the Secretary could decide in this case is whether respondents violated the Act or the rules of the Exchange; by definition, that is the only issue over which the Commission has jurisdiction. The issues in the antitrust case, however, are much broader; the complaint alleges that respondents conspired to deprive petitioner of a membership and trading privileges. Neither the Secretary nor the Commission has authority to decide that issue, or to grant effective relief against it. Cf. *Pan American World Airways* v. *United States*, 371 U.S. 296.*

The present case is, therefore, similar to *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439, where the Court held that a complaint charging a conspiracy among railroads to fix rates alleged a violation of the antitrust laws cognizable in the federal courts without the need for prior resort to the Interstate Commerce Commission. The Court reasoned that even

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* Compare *Denver Union Stockyard Co.* v. *Denver Live Stock Commission Co.*, 404 F. 2d 1055 (C.A. 10), certiorari denied, 394 U.S. 1014, where the court held that the Secretary of Agriculture did not have primary jurisdiction under the Packers and Stockyards Act to consider an antitrust complaint alleging monopolization of the stockyard business in Denver and challenging a merger of two stockyard firms.

though the Commission had primary jurisdiction to determine the reasonableness of rates, it had no authority to immunize or prohibit combinations of competitors fixing rates.

The present case is unlike *Silver* v. *New York Stock Exchange*, 373 U.S. 341, which involved the question whether the regulatory scheme of the Securities Exchange Act of 1934 created an exemption from the antitrust laws for certain actions taken by a stock exchange.[7] Here the regulation of futures trading on the commodity markets is focused so specifically on the mechanics of such trading that there is no basis for implying an antitrust exemption for that business. Moreover, *Silver* makes it clear that it is for the courts rather than an administrative agency to make any necessary reconciliation between the regulatory scheme and the antitrust laws and to determine the extent, if any, of implied repeal of those laws. The decision below therefore cannot be justified on the

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[7] In *Silver*, this Court considered whether the duty of self-regulation imposed upon a stock exchange by the Securities Exchange Act implied an exemption from the antitrust laws with respect to the arbitrary denial by a stock exchange of direct wire telephone connections between its members and two non-member broker-dealers to whose business such connections were essential. The Court held that "[r]epeal [of the antitrust laws] is to be regarded as implied only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary." 373 U.S. at 357. Applying this test, the Court ruled that "particular instances of exchange self-regulation which fall within the scope and purposes of the Securities Exchange Act may be regarded as justified in answer to the assertion of an antitrust claim," but that the arbitrary act of self-regulation involved was not so justified. 373 U.S. at 361.

ground that the Secretary or the Commission should determine in the first instance the scope of any possible antitrust immunity.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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In The

Supreme Court of the United States

October Term, 1971

THOMAS RICCI,

Petitioner,

vs.

CHICAGO MERCANTILE EXCHANGE, an Illinois not-for-profit corporation, EVERETTE B. HARRIS, WILLIAM PHELAN, LEO MELAMED, THE SIEGEL TRADING CO., INC., a corporation, and JOSEPH E. SIEGEL,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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BRIEF FOR RESPONDENTS, THE SIEGEL TRADING CO., INC., a corporation, and JOSEPH E. SIEGEL, IN OPPOSITION

OPINIONS BELOW.

The decision of the United States District Court for the Northern District of Illinois, Civil Action No. 69 C 1030 (1970) (unpublished), the opinion of the United States Court of Appeals for the Seventh Circuit, 447 F. 2d 713 (7th Cir. 1971) (not 414 F. 2d 713 as cited in the Petition),

and the order of the Court of Appeals, sitting *en banc*, denying the Petition for Rehearing on the Issue of Primary Jurisdiction (unpublished), appear in Petitioner's Appendix.

JURISDICTION.

These Respondents do not question the jurisdiction as set forth in the Petition.

QUESTIONS PRESENTED.

The questions presented are not those set forth by the Petitioner. The Statement of the Case and the Petitioner's argument in fact indicate the questions are as follows:

1. Whether, having found that a complaint property alleges group boycott, a per se violation of Section 1 of the Sherman Act (15 U.S.C. §1), by a commodities exchange, its officers and a member, the Court of Appeals erred in ordering that the proceedings be stayed until such time as the Commodity Exchange Commission and/or the Secretary of Agriculture may act upon it.

2. Whether the Commodity Exchange Act provides a partial exemption from the antitrust laws to commodity exchanges and members thereof and gives the Commodity Exchange Commission and/or the Secretary of Agriculture power to exercise primary jurisdiction.

STATUTORY PROVISIONS INVOLVED.

Petitioner's statement of the statutory provisions involved and exposition of them in the appendix are substantially correct.

STATEMENT OF THE CASE.

Petitioner's statement of the case is substantially correct with one exception. The question of primary jurisdiction was alluded to during the oral argument during the discussion of *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963).

ARGUMENT.

I.

THE WRIT OF CERTIORARI SHOULD NOT BE GRANTED.

The instant case presents no questions of novelty or uniqueness which would require the granting of the writ of certiorari. The only manner in which this case differs from the traditional primary jurisdiction case is that the nature of the CEC's regulation is not so detailed as that of agencies such as the Interstate Commerce Commission and Civil Aeronautics Board, which oversee rates, routes and acquisitions. The Court of Appeals' decision was a natural outgrowth of *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963), wherein this Court took cognizance of the regulatory authority of the Securities and Exchange Commission and the New York Stock Exchange and the relationship of their powers to the antitrust laws.

The spectrum of pending District Court cases cited by Petitioner in no way differs from the spectrum of cases involving the relationship of primary jurisdiction to any other regulatory agency. In each case, the ruling depends upon the facts of the case and their application to the Commodity Exchange Act. The outcome of those cases in no way depends upon the outcome of this case.

II.

RESPONSE TO PETITIONER'S ARGUMENTS.

A.

Primary Jurisdiction Properly Rests In The CEC(*) Under Its General Regulatory Powers And Under 7 U.S.C. §13c(b), Which Gives It Discretion Not To Report Minor Violations.

1. A Specific Statutory Provision to the Contrary Is Not Necessary To Divest the United States District Courts of Exclusive Jurisdiction of Antitrust Actions.

2. The Commodity Exchange Act Authorizes the Secretary of Agriculture and the CEC To Grant Immunity and Provide Exemptions from the Antitrust Laws and Make Determinations Regarding Antitrust Questions.

The Commodity Exchange Act, 7 U.S.C. §§ 13a and 13c(b), provides as follows:

> 13a. If any contract market is not enforcing or has not enforced its rules of government . . . or any director, officer, agent, or employee of any contract market otherwise is violating or has violated any of the provisions of this chapter or any of the rules, regulations or orders of the Secretary of Agriculture or the commission thereunder, the commission may, upon notice and hearing and subject to appeal as in other cases provided for . . . make and enter an order that such contract market, director, officer, agent, or employee shall cease and desist from such violation. . . .
>
> 13c(b) Nothing in this chapter shall be construed as requiring the Secretary of Agriculture or the

(*) The Commodities Exchange Commission and/or the Secretary of Agriculture are referred to for convenience herein as the CEC.

commission to report minor violations of this chapter for prosecution, whenever it appears that the public interest does not require such action.

Primary jurisdiction applies where "a claim is originally cognizable in the courts and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views." *United States* v. *Western Pac. R. Co.*, 352 U.S. 59, 63-64 (1956). Contrary to Petitioner's contention, a specific statutory provision to the contrary is not necessary to divest the United States District Courts of exclusive jurisdiction of antitrust actions. See *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963).

For the court to decide whether to invoke the doctrine of primary jurisdiction requires "an *analysis* which reconciles the operation of both statutory schemes . . . (here the antitrust laws and the Commodity Exchange Act) with one another rather than holding one completely ousted. . . . That general power to adopt rules relating to the relations of its members with non-members, however, does not in and of itself place the application of such rules outside the reach of the antitrust laws. Rather it is at this point that the analysis of reconciliation really begins." *Thill Securities Corp.* v. *New York Stock Exchange*, 433 F. 2d 264, 268-269 (7th Cir. 1970), cert. den. 401 U.S. 994 (1971).

Though Petitioner contends that repeal of antitrust laws by implication in a regulated industry is not favored, he fails to point out the proper circumstances where such a

repeal may be made. The instant case clearly comes within the four requirements of *Thill Securities*, as set forth by the Court of Appeals in its decision below.

The Court of Appeals' analysis that the general jurisdiction of the CEC and the discretion of the CEC and Secretary of Agriculture not to report minor violations under §13c(b) implies an antitrust exemption or at least the granting of discretion to deal with antitrust questions is correct. The amendment was enacted in 1968, after the *Silver* case and most of the leading cases dealing with primary jurisdiction were decided. It was part of the first major amendment since the original Commodity Exchange Act was enacted in 1936, prior to the major developments in the case law of the doctrine of primary jurisdiction. A legislative intent to increase the powers of the CEC in this area can therefore be implied. The first requirement of *Thill*, the commission's power to weigh antitrust policy in fulfilling its duty of review of exchange self-regulation, is thus met. That the second requirement of *Thill*, the ability of the aggrieved party to initiate Commission review under Title 17, C.F.R. §§0.3 and 0.53, is present, was sufficiently demonstrated by the Court of Appeals in its opinion.

It is clear that commission expertise would be useful in resolving the issues since the CEC may be presumed to have a familiarity with the rules of the Defendant-Chicago Mercantile Exchange (CME). That the CEC could take antitrust principles into account, the fourth guideline of *Thill*, was also aptly demonstrated by the Court of Appeals.

In Kestenbaum, *Primary Jurisdiction to Decide Antitrust Jurisdiction: A Practical Approach to the Allocation of Functions*, 55 Geo. L. J. 812, 820 (1967), it is stated:

"Acknowledging the Court's complete responsibility when no agency exists and its ultimate control in all cases, why ignore the views of the expert body when available? In other contexts, it is often said that *an agency's views of its own statute is entitled to considerable weight* (italics added), even though the question of interpretation is ultimately for the courts. So here, it may be said that the agency's exposition of the objectives of the regulatory scheme, and of the needs which have become apparent in its administration, is relevant to their compatibility with antitrust rules, as well as to the existence and scope of antitrust immunity.

"There is of course no trace of such dialogue in any case except *Jewel Tea.* [*Meat Cutters* v. *Jewel Tea,* 381 U.S. 676 (1965).] That decision suggests that there may yet be cases calling for reference to a regulatory agency of issues of antitrust jurisdiction hinging upon interpretation of regulatory statutes."

It is clear that this is such a case.

B.

The Regulatory Scheme Of The Commodity Exchange Act Is So Pervasive As To Include Antitrust Questions.

As our society and the apparatus of government become more complex, so the doctrine of primary jurisdiction evolves beyond its original restrictiveness. Since most of the cases have dealt with problems of regulatory agencies dealing with rates and routes, necessarily the law on the subject has been stated in that limited context. See *United States* v. *R.C.A.,* 358 U.S. 334, 348 (1959). However, when the doctrine is applied to a regulatory agency which is not of the nature of the Interstate Commerce Commission or

Civil Aeronautics Board, the language necessarily describing the relationship of the doctrine to those latter bodies should not restrict the application of the doctrine to another type of regulatory agency, such as the CEC.

The CEC and Secretary of Agriculture have as complete and pervasive authority to regulate free competition in their industry as the other regulatory agencies have in their industries. The Secretary of Agriculture has the power to authorize and designate a board of trade as a contract market (7 U.S.C. §7); to pass on all by-laws, rules, regulations and resolutions of a contract market (7 U.S.C. 7a); to suspend a contract market for not enforcing its own rules (7 U.S.C. §8); to register traders on a contract market and to order certain traders to desist from trading on a contract market (7 U.S.C. §§9, 12a). Thus the Secretary of Agriculture has the power to control who shall engage in the commodity futures trading business and has jurisdiction over any violation by a contract market of its own membership rules by virtue of §§7a and 8. Since Petitioner alleges a violation of the rules of the Defendant-CME, the Secretary of Agriculture has primary authority under 7 U.S.C. §13c(b) to withhold reporting of the violation.

California v. *Fed. Power Comm'n*, 369 U.S. 482 (1962), cited by Petitioner, does not even deal with the "pervasive regulatory scheme" question. The Court found that a specific provision of the Clayton Act specifically provided that the Federal Power Commission cannot enforce the antitrust laws and that thus the FPC, in a prior administrative ruling, had usurped its powers.

Milk Producers Assn. v. *U.S.*, (cited by Petitioner as *Maryland and Virginia Milk Producers Ass'n* v. *United States*), 362 U.S. 458 (1960), and *United States* v. *Borden*

Co., 308 U.S. 188 (1939), did not touch the pervasive regulatory scheme issue. In these cases, an agricultural cooperative was given a statutory antitrust exemption to make agreements to process, handle and market agricultural produce for its producer members, subject to the approval of the Secretary of Agriculture. The Court held that this statute did not thereby grant an antitrust exemption and confer on the Secretary of Agriculture jurisdiction over a monopolistic agreement between such a cooperative and another entity involved in another step in the chain of distribution of the produce.

United States v. *R.C.A.*, 358 U.S. 334 (1959), also was cited by Petitioner to support his contention that a pervasive regulatory scheme is necessary for the invocation of primary jurisdiction. The case involved a Government suit for divestiture after an exchange of television stations which the Federal Communications Commission had approved. The Court studied the legislative history of the Communications Act and found that the legislative history specifically stated that the FCC had no authority to pass on antitrust violations as such.

McKeon Construction v. *McClatchy Newspapers*, 1970 CCH Trade Cases ¶73,212 (N.D. Cal. 1969), merely followed *R.C.A.* In *R.C.A.*, there was no discretion involved. Petitioner's attempt to limit the doctrine to carrier cases by quoting from *R.C.A.* is incorrect. Most of the older cases were in fact carrier cases, simply because the ICC was the first, or one of the first, regulatory agencies. The ICC's regulation of its industry might be more "pervasive" in the sense of being more detailed than the CEC's, but this is merely because of the nature of the industry. Yet the CEC's *authority* to control its industry and to determine

who will compete in its industry as a broker and as an exchange is just as complete as the ICC's and the extent of its regulation is just as pervasive.

Petitioner's citation of *Denver Union Stockyard Co.* v. *Denver Livestock Com'n Co.*, 404 F. 2d 1055 (10th Cir. 1968), cert. den. 394 U.S. 1014 (1969) is inapposite because the case was decided on an interpretation of the Stockyards and Packers Act. The Act specifically states that nothing therein shall create an exemption from the Sherman or Clayton Acts. 7 U.S.C. §225. The fact that stockyards and commodity exchanges are both under the authority of the Secretary of Agriculture does not make the Packers and Stockyards Act of 1921 and the Commodity Exchange Act analogous. Furthermore, the Court, in *Denver Union Stockyard*, stated that there is no fixed formula for the application of the doctrine of primary jurisdiction. 404 F. 2d at p. 1056.

Crain v. *Blue Grass Stockyards Company*, 399 F. 2d 868 (6th Cir. 1968), cited by Petitioner, which also turned on a construction of the Packers and Stockyards Act, recognizes the evolution of the doctrine from rate cases involving carriers to technical questions which require administrative expertise. In the instant case, the Court decided that interpretation of Defendant-CME's rules requires the administrative expertise of the CEC.

C.

The Administrative Agency Has The Power To Grant Relief To The Petitioner.

1. **Petitioner Has Standing Before the CEC.**
2. **The Fact that the Agency Cannot Grant Damages Does Not Preclude the Agency From Hearing the Case.**
3. **Reference to the CEC Is Necessary To Maintain Uniformity of Agency Policy.**
4. **The Case Requires the CEC's Expertise.**

Plaintiff's contention that he is without right to appear before the administrative agency is without merit when considered in the light of Title 17, C.F.R. §§0.3 and 0.53, which provide that "any interested person having any information of any violation of the act" may file an application requesting the institution of proceedings before the Secretary or the Commission. To term the Commission as impotent because it has the discretion to exclude him is a contradiction in terms. If the Commission excludes him improperly, Petitioner can always appeal.

The fact that an agency does not have the power to award damages does not prevent the application of the doctrine of primary jurisdiction. *Silver* v. *New York Stock Exchange, supra; Thill Securities Corp.* v. *New York Stock Exchange, supra.* If that were the case, the doctrine never would have taken root and developed.

Petitioner argues that there is no power in the CEC or the Secretary to exempt Defendants or either of them from the operation of the antitrust laws. Yet no law is cited in support of this proposition. The cases cited by Petitioner merely state as *dicta* that since an administrative agency did not have the power to award damages, primary juris-

diction would not lie. The reasoning employed by Petitioner is circular. It is implicit in the cited cases that the court first grappled with the dispositive question of whether there was partial antitrust immunity and decided this question in the negative. On the other hand, if there be partial antitrust immunity, as there is in this case, then Petitioner is not entitled to damages and the question of the agency's power to award them is moot.

For example, in *Allied Air Freight, Inc.* v. *Pan American World Airways, Inc.*, 393 F. 2d 441 (2d Cir. 1968), cited by Petitioner, the Court held that Plaintiff did not have to exhaust his administrative remedies before an administrative agency which had no power to grant the relief sought, and that the alleged anticompetitive agreement did not have Civil Aeronautics Board (CAB) approval and thus was not exempt from the antitrust laws. On the contrary, in the instant matter the CEC has jurisdiction over the parties, Petitioner had an opportunity to have a CEC hearing, and the activity was exempt from the antitrust laws under §13c(b).

Trans World Airlines, Inc. v. *Hughes*, 214 F. Supp. 106 (S.D. N.Y. 1963), aff'd 332 F. 2d 602 (2d Cir. 1964), dealt with a statute that declares it unlawful, without CAB approval, for anyone engaged in a phase of aeronautics to acquire control of an air carrier, and that with such CAB approval, the acquisition is exempt from the antitrust laws. Defendant was a manufacturer of aircraft. Pursuant to CAB approval, it acquired control of TWA. Subsequently, Defendant committed antitrust violations by economically coercing TWA to purchase only Defendant's aircraft. The Court held that these acts were not the type of acts over which the CAB had primary jurisdiction; that the CAB

only has jurisdiction over the acquisition itself, "rather than the broad range of activities into which the controller may enter thereafter." 332 F. 2d at p. 608. After the acquisition, the CAB retains jurisdiction over the air carrier, but not over the company that owns controlling stock in the air carrier. The Court's statement that the Board is unable to grant damages is a *non sequitur* and *dicta*. Under the proper set of facts, this inability should not preclude primary jurisdiction.

In *Breen Air Freight, Ltd.* v. *Air Cargo, Inc.*, 1971 CCH Trade Cases ¶73,775 (S.D. N.Y. 1971), Defendant was a freight forwarding company owned by seventeen certified air carriers. Defendant had hired Plaintiffs to handle its freight and then discharged Plaintiffs and hired its own subsidiary. Defendant had been established with CAB approval, but its subsidiary had not. The court held at p. 91273: "While an express finding of immunity from the antitrust laws may not be necessary to confer immunity, the record does not support continued surveillance of the activities of Air Cargo, Inc., itself acting on its own, to be distinguished from broader, over-all scrutiny of such conceded areas of traditional CAB expertise such as tariffs." The Court followed the reasoning of *TWA*.

Contrary to Petitioner's position, *Pan American World Airways* v. *U.S.*, 371 U.S. 296, 311-312 (1963), recognized that the "[Civil Aeronautics] Board has no power to award damages or to bring criminal prosecutions. Nor does it, as already noted, have jurisdiction over every antitrust violation by air carriers. But where the problem lies within the purview of the Board, as do questions of division of territories, the allocation of routes, and the affiliation of common carriers with air carriers, *Congress must have intend-*

ed to give it authority that was ample to deal with the evil at hand (italics added). In *Carnation Co.* v. *Pacific Conference* 383 U.S. 213 (1966), this Court merely held that Defendant's actions were not exempt from the antitrust laws by virtue of the Shipping Act and that therefore Plaintiff could recover damages in a legal action.

Petitioner contends that primary jurisdiction may be invoked only when uniformity of agency policy is in question, and that there is no potential repugnance between a possible decision of the CEC and the award of treble damages in an antitrust action. Yet, Petitioner fails to recognize that the discretion given to the CEC by §13c(b) not to report minor violations is inconsistent with a punitive award of treble damages.

Furthermore, the CEC has power to oversee membership rules and policies of contract markets, and it is likely the CEC would desire to keep these rules and policies consistent.

The expertise of the agency, which Petitioner denies is present, is the greater familiarity and experience of the CEC with the rules of the Defendant CME and the procedures in the industry.

D.

The Question Of Whether Defendants' Actions Were Arguably Lawful Is Not Reached In This Case.

Petitioner contends that the Defendants' conduct must be arguably lawful under the regulatory statute for primary jurisdiction to attach. However, Petitioner seeks to misshape the "arguably lawful" doctrine into a meaning other than its true one and then cites cases which do not even support the stated proposition.

The "arguably lawful" doctrine merely provides that if a regulatory agency approved the action of the party, that party can interpose said agency approval as a defense in a subsequent judicial antitrust action. The doctrine only applies when there has been a prior hearing before an agency and subsequently the Defendant is subjected to an antitrust suit. However, merely because there was never a prior administrative determination does not mean the Defendant has no defense to the antitrust suit and that primary jurisdiction cannot attach.

Petitioner's statement that the Court below held that the Defendant's conduct is not arguably lawful begs the question. The Court held that the complaint states a cause of action under the antitrust laws *prescinding from* the Commodities Exchange Act and the doctrine of primary jurisdiction but that whether the complaint, taking those two factors into account, states a cause of action, is a question that the Court below held should be answered by the Secretary of Agriculture and/or the CEC.

In *Carnation Co.* v. *Pacific Conference,* 383 U.S. 213 (1966), the Court merely stated that agreements previously approved by the Federal Maritime Commission (FMC) are, *by statute,* exempt from the antitrust laws, but agreements not approved are not exempt. In the instant matter, Defendants never had an opportunity to have a regulatory body determine if their actions were legal.

Far East Conf. v. *United States,* 342 U.S. 570 (1952) and *U.S. Nav. Co.* v. *Cunard S.S. Co.,* 284 U.S. 474 (1932), cited by Petitioner, held that the FMC cannot validate preapproval implementation of such agreements. However, this does not mean that the CEC cannot find that the Defendants' action was within its rules and proper.

The cases cited do not support Petitioner's proposition that the "arguably lawful" doctrine is a necessary element for the invocation of primary jurisdiction in the instant case.

The citation of *Allied Air Freight, Inc.* v. *Pan American World Airways, Inc.*, 393 F. 2d 441 (2d Cir. 1968) is also inapposite. Defendants entered into a monopolistic agreement which had not been filed with or approved by the CAB. The Court held that defendants therefore could not argue that the agreement was arguably lawful and the Court refused to grant primary jurisdiction to the CAB.

Marnell v. *United Parcel Service of America, Inc.*, 260 F. Supp. 391, 412 (N.D. Cal. 1966), is directly in support of Defendants' position. The very reason the Court of Appeals remanded the case to the Secretary of Agriculture is because "the conduct in question might be exempt from the antitrust laws by the regulatory agency under some express or plainly implied provision of the regulatory act." In *Marnell*, the Court held that defendants did not receive permission from the state commerce commission to commit the monopolistic acts they committed, and that the state commerce commission and the ICC had no jurisdiction over those types of acts.

In *Breen Air Freight, Ltd.* v. *Air Cargo, Inc.*, 1971 CCH Trade Cases ¶ 73,775 (S.D. N.Y. 1971), the Court held that the CAB did not have jurisdiction to decide the question involved.

Although Congress has encouraged private litigation allowing treble damages, it is clear that §13c(b) of the Commodity Exchange Act, in the light of *Silver*, created an antitrust exemption under the circumstances of the instant case.

CONCLUSION.

For the foregoing reasons, Respondents Joseph E. Siegel and The Siegel Trading Co., Inc., respectfully pray that the Petition for a Writ of Certiorari by Thomas Ricci to review the judgment of the United States Court of Appeals for the Seventh Circuit be denied.

Respectfully submitted,

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APPENDIX

The Commodity Exchange Act (7 U.S.C. §7 et. seq.) provides in pertinent part:

"§7. *Duties of contract market*

Each contract market shall—

(1) Promptly furnish the Secretary of Agriculture copies of all by-laws, rules, regulations, and resolutions made or issued by it or by the governing board thereof or any committee, and of all changes and proposed changes therein. . . ."

§ 9. *Exclusion of persons from privilege of "contract markets"; procedure for exclusion; review by court of appeals*

If the Secretary of Agriculture has reason to believe that any person (other than a contract market) is manipulating or attempting to manipulate or has manipulated or attempted to manipulate the market price of any commodity, in interstate commerce, or for future delivery on or subject to the rules of any contract market, or has willfully made any false or misleading statement of a material fact in any registration application or any report filed with the Secretary of Agriculture under this chapter, or willfully omitted to state in any such application or report any material fact which is required to be stated therein, or otherwise is violating or has violated any of the provisions of this chapter or of the rules, regulations, or orders of the Secretary of Agriculture or the commission thereunder, he may serve upon such person a complaint stating his charges in that respect, which

complaint shall have attached or shall contain therein a notice of hearing, specifying a day and place not less than three days after the service thereof, requiring such person to show cause why an order should not be made prohibiting him from trading on or subject to the rules of any contract market, and directing that all contract markets refuse all trading privileges to such person, until further notice of the Secretary of Agriculture, and to show cause why the registration of such person, if registered as futures commission merchant or as floor broker hereunder, should not be suspended or revoked. Said hearing may be held in Washington, District of Columbia, or elsewhere, before the Secretary of Agriculture, or before a referee designated by the Secretary of Agriculture, which referee shall cause all evidence to be reduced to writing and forthwith transmit the same to the Secretary of Agriculture. Upon evidence received, the Secretary of Agriculture may prohibit such person from trading on or subject to the rules of any contract market and require all contract markets to refuse such person all trading privileges thereon for such period as may be specified in the order, and, if such person is registered as futures commission merchant or as floor broker hereunder, may suspend, for a period not to exceed six months, or revoke, the registration of such person. Notice of such order shall be sent forthwith by registered mail or by certified mail or delivered to the offending person and to the governing boards of said contract markets. After the issuance of the order by the Secretary of Agriculture, the person against whom it is issued may obtain a review of such order or such other equitable relief as to the court may seem just by filing

in the United States court of appeals of the circuit in which the petitioner is doing business a written petition praying that the order of the Secretary of Agriculture be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Secretary of Agriculture and thereupon the Secretary of Agriculture shall file in the court the record theretofore made, as provided in section 2112 of Title 28. Upon the filing of the petition the court shall have jurisdiction to affirm, to set aside, or modify the order of the Secretary of Agriculture, and the findings of the Secretary of Agriculture as to the facts, if supported by the weight of evidence, shall in like manner be conclusive.

§ 12a. *Registration of commission merchants and brokers; fees; rules and regulations; publication of harmful acts; disapproval of by-laws, etc.*

The Secretary of Agriculture is authorized—

(1) to register futures commission merchants and floor brokers upon application in accordance with the rules and regulations and in form and manner to be prescribed by the Secretary of Agriculture; and

(2) to refuse to register any person—

(A) if the prior registration of such person has been suspended (and the period of such suspension shall not have expired) or has been revoked;

(B) if it is found, after opportunity for hearing, that the applicant is unfit to engage in the business for which the application for registration is made, (i) because such applicant, or, if the applicant is a partnership, any general partner, or, if the applicant

is a corporation, any officer or holder of more than 10 per centum of the stock, at any time engaged in any practice of the character prohibited by this chapter or was convicted of a felony in any State or Federal court, or was debarred by any agency of the United States from contracting with the United States, or the applicant willfully made any material false or misleading statement in his application or willfully omitted to state any material fact in connection with the application, or (ii) for other good cause shown; or

(C) in the case of an applicant for registration as futures commission merchant, if it is found after opportunity for hearing that the applicant has not established that he meets the minimum financial requirements under section 6f of this title; *Provided,* That pending final determination under clause (B) or (C), registration shall not be granted; *And provided further,* That the applicant may appeal from a refusal of registration under clause (B) or (C) in the manner provided in section 9 of this title; and

(3) in accordance with the procedure provided for in section 9 of this title, to suspend or revoke the registration of any person registered under this chapter if cause exists under paragraph (2) (B) or (C) of this section which would warrant a refusal of registration of such person, and to suspend or revoke the registration of any futures commission merchant who shall knowingly accept any order for the purchase or sale of any commodity for future delivery on or subject to the rules of any contract market from any person if such person has

been denied trading privileges on any contract market by order of the Secretary of Agriculture under the provisions of section 9 of this title and the period of denial specified in such order shall not have expired; and

(4) to fix and establish from time to time reasonable fees and charges for registrations and renewals thereof; and

(5) to make and promulgate such rules and regulations as, in the judgment of the Secretary of Agriculture, are reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes of this chapter;

(6) to communicate to the proper committee or officer of any contract market and to publish, notwithstanding the provisions of section 12 of this title, the full facts concerning any transaction or market operation, including the names of parties thereto, which in the judgment of the Secretary of Agriculture disrupts or tends to disrupt any market or is otherwise harmful or against the best interests of producers and consumers; and

(7) to disapprove any bylaw, rule, regulation, or resolution made, issued or proposed by a contract market or by the governing board thereof or any committee which relates to terms and conditions in contracts of sale to be executed on or subject to the rules of such contract market or relates to other trading requirements, when he finds that such bylaw, rule, regulation, or resolution violates or will violate any of the provisions of this chapter, or any of the rules, regulations, or orders of the Secretary of Agriculture or the commission thereunder.

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MICHAEL RODAK, JR.

In the

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-858

THOMAS RICCI,

Petitioner,

vs.

CHICAGO MERCANTILE EXCHANGE, an Illinois not-for-profit corporation, EVERETTE B. HARRIS, WILLIAM PHELAN, LEO MELAMED, THE SIEGEL TRADING COMPANY, a corporation, and JOSEPH E. SIEGEL,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR THE PETITIONER

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In the

Supreme Court of the United States

October Term, 1971

No. 71-858

THOMAS RICCI,

Petitioner,

vs.

CHICAGO MERCANTILE EXCHANGE, an Illinois not-for-profit corporation, EVERETTE B. HARRIS, WILLIAM PHELAN, LEO MELAMED, THE SIEGEL TRADING COMPANY, a corporation, and JOSEPH E. SIEGEL,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The decision of the United States District Court for the Northern District of Illinois, Civil Action No. 69 C 1030 (1970, unpublished), the opinion of the Court of Appeals, 414 F.2d 713 (7th Cir., 1971) and the order of the Court of Appeals denying the Petition for Rehearing on the Issue of Primary Jurisdiction (unpublished), are reprinted in the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on June 17, 1971. A timely Petition for Rehearing was denied on October 5, 1971. The Petition for for a Writ of Certiorari ("the Petition") was filed in this Court within 90 days from that latter date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254. This Court granted the Petition on February 28, 1972.

QUESTIONS PRESENTED

1. Whether, having found that the complaint properly alleges a boycott, a *per se* violation of Section 1 of the Sherman Act, by a commodities exchange, its officers and a member thereof, the Court of Appeals erred in invoking the doctrine of primary jurisdiction and ordering that the matter be submitted for decision to the Commodity Exchange Commission and/or the Secretary of Agriculture.

2. Whether the Commodity Exchange Act ("the Act") creates a regulatory scheme so pervasive as to exclude antitrust determinations by the statutory antitrust court where the regulatory agency by the Act:

   a. Is expressly given authority only to enforce the regulatory statute; and

   b. Is given no authority to grant antitrust exemption to commodities exchanges and their members or to determine antitrust issues; and

   c. Has by regulation excluded injured private parties from standing before such agency; and

   d. Is without authority to grant relief in the form of damages for injury resulting from antitrust violation or other tortious conduct.

3. Whether there exists a positive repugnancy between the antitrust laws and the Act and the respective objectives

thereof which requires the prior resolution of antitrust questions by an administrative agency.

4. Whether disposition of an antitrust case by the District Court wherein the injured party seeks only damages for past violations of the antitrust laws will disrupt the regulatory scheme created by the Act.

STATUTORY PROVISIONS INVOLVED

Section 4 of the Clayton Act (15 U.S.C. §15) provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

The pertinent provisions of the Commodity Exchange Act (7 U.S.C. §1 et seq.) are reprinted in the Addendum attached to this brief.

STATEMENT

This action was brought by plaintiff-appellant Thomas Ricci (hereinaafter "Ricci") for treble damages under Section 4 of the Clayton Act. (15 U.S.C. §15). Named as defendants were the Chicago Mercantile Exchange (hereinafter "the Exchange"), three of its officers and one of its members, Joseph Siegel and the Siegel Trading Company.* The complaint charges that the defendants violated Section 1 of the Sherman Act and otherwise tortiously interfered with commercial relationships in that they "willfully, knowingly and maliciously confederated, combined and conspired

* Hereinafter collectively referred to as "Siegel."

and agreed" to prevent Ricci from maintaining his membership on the Exchange and transacting business as a broker. (A. 11).

As this case arises on the pleadings, the facts are as alleged in the complaint.

Ricci had purchased a membership on the Exchange and was qualified to trade in commodities and commodities futures. (A. 10). Siegel claimed to be the owner of Ricci's membership, but Ricci informed the Exchange that his indebtedness to Siegel, upon which the latter's claim was based, was more than offset by certain fees owed by Siegel to Ricci. Siegel, however, thereafter induced the defendant officers of the Exchange to breach its rules and, by various means, (including the issuance of antedated release and the transfer of Ricci's membership to a third party), deprived Ricci of his membership and trading privileges. (A. 12-14). The effect of the conspiracy as alleged was completely to exclude Ricci from trading during the period from February 11, to March 4, 1969. By virtue of the alleged conspiracy, Ricci was seriously disadvantaged *vis a vis* other members of the Exchange who were his competitors and was injured in his business and property as a broker. (A. 13).

The District Court dismissed the complaint for failure to state a cause of action under Section 1 of the Sherman Act. (A. 22).

The Court of Appeals, with all three members in agreement, reversed the judgment of the District Court, holding that:

> "Transfer of his [Ricci's] membership in violation of the rules of the Exchange and pursuant to a conspiracy to intentionally injure his business would con-

stitute a group boycott, per se actionable under the Sherman Act. (A. 36).

• • •

"In view of the foregoing, we conclude that, absent any justification from the Exchange's status as a board of trade and a designated 'contract market', the complaint is sufficient to allege a group boycott, a per se violation of Section 1 of the Sherman Act." (A. 37).

However, the majority of the Court of Appeals (two judges) *sua sponte*, and with a strong dissent, ordered the cause remanded to the District Court with instructions to stay the proceedings pending action thereon "by the Commodities Exchange Commission and/or the Secretary of Agriculture." (A. 45).

This Court granted Ricci's Petition for Writ of Certiorari to the Court of Appeals on February 28, 1972.

SUMMARY OF ARGUMENT

The national economic policy embodied in the antitrust laws may not be frustrated because of the mere existence of a regulatory statute governing certain aspects of a particular industry. Absent a specific Congressional mandate to the contrary, antitrust questions are, under Section 4 of the Clayton Act, properly within the exclusive jurisdiction of the district courts. There is no such mandate in the Commodity Exchange Act. Nothing in the said Act confers upon the administrative agency any responsibility for antitrust determinations. The agency is expressly limited to the enforcement of the Act's provisions. The regulatory scheme is not so pervasive that the agency can fulfill its statutory functions only by excluding the District Court from the disposition of antitrust issues.

The conduct alleged in the complaint is a *per se* violation of the antitrust laws. It is not arguably lawful under the Commodity Exchange Act. Hence, a determination by the statutory antitrust court will not disrupt the administrative scheme. Moreover, the complaint seeks damages for past conduct, not prospective injunctive relief. Hence, there is no danger that the District Court's determination of an antitrust issue will conflict with agency administration of the regulatory statute.

Finally, the regulatory agency is without power to afford an injured private party monetary relief. The regulations promulgated by the administrator expressly exclude injured private parties from all but minimal and indirect access to the agency's enforcement processes.

In these circumstances, it was improper for Court of Appeals to invoke the doctrine of primary jurisdiction. Invocation here extends the said doctrine's use far beyond that heretofore authorized and is an unneeded and unwarranted exercise in judicial self restraint.

ARGUMENT

I. THE COMMODITY EXCHANGE ACT DOES NOT CREATE AN EXEMPTION FROM THE ANTITRUST LAWS.

The judgment of the court below is premised upon the assumption that defendants' wrongful conduct, although a *per se* violation of the Sherman Act, may, in some manner, be excused by the Secretary of Agriculture (hereinafter "the Secretary") or the Commodity Exchange Commission (hereinafter "the CEC"). The Court of Appeals has thus sought to immunize conduct violative of the antitrust laws. This is contrary to basic principles to be applied to the relationship between the regulatory and antitrust statutes.

A. The Court Below Ignored Fundamental Antitrust Policy.

This Court has consistently held that, since the antitrust laws represent basic economic policy, repeal of such laws by implication from a regulatory statute will be strongly disfavored. *United States* v. *Borden Co.*, 308 U.S. 188, 198 (1939); *United States* v. *Southern Pacific Co.*, 259 U.S. 214, 239 (1921); *California* v. *Federal Power Commission*, 369 U.S. 482, 485 (1962); *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 348 (1963); *Carnation Co.* v. *The Pacific Westbound Conference*, 383 U.S. 213, 217 (1966). In *Carnation*, this Court stated:

> "We recently said: 'Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions.' *United States* v. *Philadelphia National Bank*,

> *supra. We have long recognized that the antitrust laws represent a fundamental national economic policy and have therefore concluded that we cannot lightly assume that the enactment of a special regulatory scheme for particular aspects of an industry was intended to render the more general provisions of the antitrust laws wholly inapplicable to that industry.* We have, therefore, declined to construe special industry regulations as an implied repeal of the antitrust laws even when the regulatory statute did not contain an accommodation provision. . . ." (383 U.S. at 217-218, emphasis supplied)

This above stated doctrine, ". . . which reflects the felt indispensable role of antitrust policy in the maintenance of a free economy . . ." (*United States* v. *Philadelphia National Bank,* 374 U.S. at 348), is controlling in this case. The decision of the court below can be sustained only if there exists a "plain" or "positive repugnancy" between the antitrust laws and the Commodity Exchange Act. *U. S.* v. *Borden Co.,* 308 U.S. 188, 199 (1939). To find such a repugnancy, it must be shown that Congress in enacting in the regulatory statute intended to restrict or eliminate antitrust considerations in the regulated industry. As stated recently by the Court of Appeals for the District of Columbia in *Seatrain Lines, Inc.* v. *Federal Maritime Commission,* 1972 CCH Trade Cas. ¶73,898 (D.C. Cir., 1972):

> ". . . [T]he proper inquiry [in cases such as this one] would seem to be to what extent Congress has knowingly adopted a policy contrary to or inconsistent with the previously established antitrust laws. . . ." (1972 CCH Trade Cas. at p. 91,730, brackets by the court).

The specific language of the Commodity Exchange Act, its legislative history and the regulatory structure which it

created demonstrate with unusual clarity that Congress at no time intended to circumvent the authority of the district court to hear and determine antitrust cases involving commodity exchanges.

B. The Words of the Statute Do Not Authorize the Secretary or the CEC to Mitigate or Immunize Antitrust Violations.

The court below ignored the primacy of the antitrust laws by imputing to the Secretary authority which the plain language of the regulating statute does not give. Words of statutes are to be taken in their "normal and customary meaning." The judiciary cannot engraft thereon additions or restrictions which Congress did not see fit to enact. *Federal Trade Commission* v. *Fred Meyer, Inc.*, 390 U.S. 341, 349 (1968); *Sun Oil Co.* v. *Federal Trade Commission*, 371 U.S. 505, 514 (1963); *Schweggmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. at 384, 388 (1951); *Georgia* v. *Evans*, 316 U.S. 159, 162-163 (1942); *United States* v. *Cooper Corp.*, 341 U.S. 600, 605 (1941). This canon of construction was ignored by the court below. Section 4 of the Clayton Act provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws *may sue therefor in any district court of the United States* . . . and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee." (emphasis supplied)

In contrast, the Commodity Exchange Act expressly limits the enforcement power of the Secretary and the CEC to violation of ". . . any of the provisions of this chapter or any of the rules, regulations, or orders . . ." of the Secretary or the CEC. (7 U.S.C. §13a and b). The term "this

chapter" is specifically defined as "the Commodity Exchange Act." (7 U.S.C. §1). The agency's statutory limitations are reinforced by the regulations promulgated by the Secretary. The term "Act" is expressly defined in the regulations as the Commodity Exchange Act. Title 17, C.F.R. §§0.2(a) and 0.52(a). The authority of the Secretary and the Commission to institute proceedings must be based upon their having reason to believe that a violation of "the Act" has or is taking place. Title 17, C.F.R. §§0.3(c), 0.53(c). The plain language of the Act and the complete absence of any provision therein for antitrust immunity or authority in the administrator to make antitrust determinations caused the dissenting judge in the court below, to state:

> "Congress has strictly limited the jurisdiction of the Secretary of Agriculture and the Commission to violations of 'the provisions of this chapter' (See, e.g., Title 7 U.S.C. §13(a)). This chapter means the 'Commodity Exchange Act' (Title 7, U.S.C. §1) and not the 'Sherman Act', which is found at 15 U.S.C. §1."

Thus, the express provisions of the statute creating the agency and the regulations under which it operates demonstrate a complete absence of antitrust enforcement powers. If Congress had desired to provide the agency with the authority to make antitrust determinations, it could easily have done so. *U.S.* v. *Borden Co.*, 308 U.S. 188, 201 (1939). Clearly, Congress chose otherwise. Nonetheless, contrary to the plain language of both the Clayton and Commodity Exchange Acts, the Court of Appeals stripped the district court of the power to determine antitrust issues in private actions, a function which Congress specifically assigned to it.

The legislative history of the Commodity Exchange Act and of its predecessors, the Grain Futures Act of 1922 and the Futures Trading Act of 1921 clearly demonstrate that Congress saw no repugnancy between the antitrust and the commodities laws. The legislative history reflects neither debate nor discussion of the antitrust laws, let alone the notion of a repugnancy between antitrust and commodities legislation. 61 Cong. Rec. 1312-1341; 1366-1399; 1428-1430; 4646-4656; 4760-4771; 5027-5031; 5376; 5518-5520; 5555-5562 (1921); 62 Cong. Rec. 9175-9178; 9403-9450; 12564; 12567-12568; 12720-12725 (1922); 79 Cong. Rec. 8585-8595; 14246 (1935); 80 Cong. Rec. 491-492; 1451; 4391; 6159-6164; 6612-6613; 7051; 7710; 7845-7873; 7905-7912; 7916-7918; 8010-8090; 8288-8293 (1936); 113 Cong. Rec. 10838-10849; 28202, no debate (1967); 114 Cong. Rec. 13668; 19767, no debate (1968).

The lack of discussion of the antitrust laws is especially noteworthy since the 67th Congress which enacted the Futures Trading Act and the Grain Futures Act also enacted the Capper-Volstead Agricultural Producers' Act (7 U.S.C.A. §§291, 292), which (1) specifically confers exemptions from the antitrust laws and (2) vests in the Secretary of Agriculture enforcement powers against any such association where he believes it monopolizes or restrains trade to such an extent that price is unduly enhanced.

The history and language of the Capper-Volstead Act demonstrate that Congress confers antitrust powers or antitrust exemptions when that is its purpose. It is likewise clear that in the legislation dealing with commodities, the same Congress conferred neither antitrust powers nor

antitrust exemptions.[1] It is also noteworthy that the 74th Congress which passed the Commodity Exchange Act without any discussion of antitrust laws was a Congress keenly aware of antitrust considerations—it enacted the Robinson-Patman Price Discrimination Act (15 U.S.C.A. §§13-13b, 21a).[2]

II. THE REGULATORY SCHEME IS NOT SO PERVASIVE AS TO EXCLUDE OR SUPERSEDE THE ANTITRUST POWERS OF THE DISTRICT COURT.

A District Court's jurisdiction in antitrust matters may be restricted only where Congress has substituted for competition a comprehensive regulatory scheme which requires

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[1] Congressional debate on the Capper-Volstead Agricultural Producers' Association Act (7 U.S.C.A. §§291, 292) took place in February 1922 (62 Cong. Rec. 2048-2054; 2057-2061; 2107-2123; 2156-2174; 2216-2230; 2256-2282 (1922)), after passage of the Futures Trading Act of 1921 but before debate on the Grain Futures Act of 1922, the latter debates having taken place in June 1922 (62 Cong. Rec. 9175-9178; 9403-9450; 12564; 12567-12568; 12720-12725 (1922)). It is clear that although the issue of antitrust exemptions was before the 67th Congress, it was an issue which did not arise during consideration of the Grain Futures Act.

[2] Much of the debate on the Commodity Exchange Act and on the Robinson-Patman Act took place during the same period of time, i.e., April and May of 1936. Thus, while the House was engaged in debate on the antitrust ramifications of the Robinson-Patman Act on May 27th and 28th (80 Cong. Rec. 8111-8140; 8223-8242 (1936)) the Senate was debating the Commodity Exchange Act on May 25th and May 27th (80 Cong. Rec. 7845-7873; 8010-8090 (1936)). Senate consideration of the Commodity Exchange Act had also taken place on April 27 (80 Cong. Rec. 6159-6164 (1936)) just before the Senate discussed the Robinson-Patman Act on April 28 and April 30 (80 Cong. Rec. 6279-6288; 6425-6436 (1936)).

an initial agency determination of antitrust questions. The doctrine of primary jurisdiction is applicable only "where protection of the integrity of the regulatory scheme dictates preliminary resort to the agency which administers the scheme." *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 353 (1963). In other words, the regulatory scheme must be "pervasive" in that its operation substitutes agency action for competition as safeguarded by the antitrust laws. *United States* v. *Radio Corporation of America*, 358 U.S. 334 (1959); *California* v. *Federal Power Commission*, 369 U.S. 483, 485 (1962). Thus the core issue in this case is whether Congress intended to substitute regulation for free competition.

"Pervasiveness" in primary jurisdiction cases is perhaps best exemplified by the rate making and route assignment powers of regulatory agencies in the transportation industry. There, Congress, in addition to providing the specific antitrust immunity lacking here, also created a comprehensive system governed at every turn by the agency rather than competitive forces. See *United States* v. *Radio Corporation of America*, 358 U.S. 334, 346 (1959).

In contrast, the regulation of commodities markets is not so pervasive as to exclude antitrust considerations or require their preliminary determination by the agency. The Act empowers the agency to act in certain specified areas. The Secretary is authorized to license and regulate commodity exchanges and trading thereon and to investigate, punish and prevent violations of the Act. The Act provides that commodity exchanges must register with the Secretary and qualify as "contract markets" by complying with carefully defined statutory requirements. 7 U.S.C. §7. These include location at a terminal market, the filing of periodic reports, prevention of dissemination of false market information and of manipulation. 7 U.S.C.

§7(a)-(d). Contract markets are also required (7 U.S.C. §7a) to furnish the Secretary with copies of their by-laws, rules and regulations and to allow inspection of their books and records by the United States Department of Agriculture. The Act similarly establishes certain duties with respect to warehouse records and the delivery of actual cash commodities. The 1968 amendments to the Commodity Exchange Act (7 U.S.C. §§7a(8) and (9)) require contract markets to enforce rules and regulations relating to the terms and conditions of transactions in the market and the maintenance of minimum financial standards for the members thereof.

However, nowhere in the scheme of contract market regulation is there any provision which gives the Secretary or the CEC the authority to even consider, let alone immunize, punish, prevent or award damages for, violations of the antitrust laws. The lack of a comprehensive or pervasive regulatory scheme renders this doctrine of primary jurisdiction inapplicable to the case. *California* v. *Federal Power Commission*, 369 U.S. 482 (1962); *Maryland & Virginia Milk Producers Assn.* v. *United States*, 362 U.S. 458 (1960); *United States* v. *Radio Corp. of America*, 358 U.S. 334, 350 (1959); *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 353 (1963). The regulatory scheme relied upon by the court below is admittedly far less pervasive than those considered in the foregoing cases where this Court refused to defer to regulatory agencies because the regulatory scheme in question provided no substitute for competition protected by the antitrust laws.

In *United States* v. *Radio Corporation of America*, 358 U.S. 334 (1959) the government charged that RCA and its wholly owned subsidiary, NBC, were engaged in a continuing conspiracy violative of Section 1 of the

Sherman Act. NBC's objective was the acquisition of stations in five of the eight largest market areas in the country. The complaint charged that, in furtherance of the conspiracy, NBC had utilized its leverage of network affiliation to force Westinghouse Broadcasting Co. to exchange its Philadelphia station for NBC's station in Cleveland. The Federal Communications Commission approved the exchange. However, this Court held that Congress had not empowered the FCC to decide antitrust questions, nor was the agency's action intended by Congress to bar federal courts from antitrust enforcement in the industry. This Court compared the FCC's authority with that of the Interstate Commerce Commission in regulating common carriers. The comparison provides a useful analogy to the regulatory scheme in the instant case. As stated by this Court:

> "There carriers could charge only the published tariff, and that tariff must have been found by the appropriate agency to be reasonable. *Free rate competition was modified by federal controls.* The Court's concern was that the agency which was expert in, and responsible for, administering those controls, should be given the opportunity to determine questions within its special competence as an aid to the courts in resolving federal antitrust policy and federal regulatory patterns into a cohesive mold. *That some resolution is necessary where the antitrust policy of free competition is placed beside a regulatory scheme involving fixed rates is obvious.* (358 U.S. at 348, emphasis supplied.)

While regulation replaced free competition in the transportation industry, this Court stated: ". . . The field of broadcasting is one of free competition." This Court concluded:

> " 'The sections dealing with broadcasting demonstrate that Congress has not, in its regulatory scheme,

> *abandoned the principle of free competition as it has done in the case of railroads . . .'* Thus, there being no pervasive regulatory scheme, and no rate structures to throw out of balance, the sporadic action by federal courts can work no mischief. The justification for primary jurisdiction accordingly disappears." (358 U.S. at 349 emphasis supplied)

A similar result was reached by this Court in *California* v. *Federal Power Commission*, 369 U.S. 482 (1962). There, a natural gas company acquired the stock of a pipeline corporation. When the government brought an action in district court charging that the acquisition violated Section 7 of the Clayton Act, the natural gas company made application to the FPC for a certificate of "convenience and necessity" to enable it to acquire the pipeline company's assets. The district court then stayed its proceedings pending final decision by the administrative agency. The FPC thereafter approved the merger. On certiorari, this Court vacated the FPC's order approving the merger and remanded the cause, holding that the FPC should not have proceeded to decide the merits of the application while the antitrust suit was pending in the courts. This Court found that Section 7 of the Clayton Act reserved to the district courts rather than the FPC, the power to make findings as to the competitive impact of the merger. Thus, while the agency was given *limited* authority with respect to natural gas mergers, the agency's responsibility was not so comprehensive as to deprive the courts of antitrust jurisdiction.

Similarly, nothing in the Act indicates that Congress intended either "to abandon the principle of free competition" or insulate group boycotts from the antitrust laws. The defendants' private agreements which excluded Ricci from trading were not approved by the agency. Ricci's exclusion from the field was accomplished by a conventional

business conspiracy, which, among other things, might also have violated the rules of the Exchange. Whether this incidental violation of the Exchange's rules might justify the Secretary in punishing the perpetrators, as by excluding them from trading, has no bearing on antitrust considerations.

The Secretary has the power to determine that the conduct in question is a "minor violation" of the Act and therefore do nothing about it. However, the discretionary action of an administrative officer in choosing not to proceed against a "minor violation" is not a vital component in a pervasive regulatory system. Enforcement of the antitrust laws is entrusted neither to the Secretary nor the CEC, but to the courts. Hence, the Secretary's discretion to punish or excuse a group boycott is not the equivalent of authorization to immunize the participants therein from antitrust liability. By the same token, the district court's consideration of antitrust issues will have no effect on the Secretary's administration of the Act. It will not unbalance administratively established rate structures or disrupt a continuing detailed program which has replaced competition. Simply stated, this case concerns a statutory tort which is neither justified, immunized, mitigated or excused by any pervasive regulatory scheme. Only an *ad hoc* determination need be made concerning the alleged wrong to an individual neither justified by any pervasive regulatory scheme nor required by an authorized program designed to limit competition in the public interest. Hence, as this Court stated in *RCA*, "Action by federal courts can work no mischief. The justification for primary jurisdiction accordingly disappears." (358 U.S. at 350)

The lower federal courts have similarly refused to defer to administrative agencies for antitrust determinations in

absence of specific congressional authority. *Seatrain Lines, Inc.* v. *Federal Maritime Commission,* 1972 C.C.H. Tr. Cases, ¶73,898 (D.C. Cir., 1972); *Denver Union Stockyards Co.* v. *Denver Livestock Commission Co.,* 404 F.2d 1055, 1059 (10th Cir., 1968); *Crane* v. *Bluegrass Stockyards Co.,* 399 F.2d 868 (6th Cir., 1968); *Keon Construction Co.* v. *McClatchy Newspapers,* 1970 C.C.H. Tr. Cases, ¶73,212, (N.D. Cal., 1969).

In *Seatrain,* the Court of Appeals for the D.C. Circuit found that, although Congress had given the FMC broad regulatory powers over "agreements" among water carriers, that power did not extend to mergers and acquisitions. Similarly, in *Denver Union* and *Bluegrass Stockyards,* the Courts of Appeals for the 10th and 6th Circuits, respectively, refused to defer to the Secretary of Agriculture because the regulatory statute* did not provide for antitrust determinations of the matters in question. In *Denver Union,* the court declined to stay an antitrust merger suit pending determination by the Secretary under the doctrine of primary jurisdiction. In *Bluegrass Stockyards,* as here, an appropriately licensed dealer claimed that he had been unjustly refused the use of the facilities and services of a regulated marketplace, in violation of the Sherman Act. There, as here, the defendant had adopted rules and regulations which allegedly related to antitrust questions. The Court of Appeals refused to refer the matter to the Secretary of Agriculture under the doctrine of primary jurisdiction. The court stated that the only matters which need be considered by the Secretary, if they became relevant, were those dealing with the reasonableness of the

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* Packers and Stockyards Act of 1921; 7 U.S.C. §181, et seq.

rules, not whether plaintiff had violated them. See also, *Breen Air Freight, Ltd.* v. *Air Cargo, Inc.*, 1971 C.C.H. Trade Cas. ¶73,775 (S.D.N.Y., 1971).

In this case, the complaint alleges only that the Exchange violated its own rules; the reasonableness of such rules is not attacked. The court below found that the complaint stated a *per se* violation of the Sherman Act. Thus, as in the Stockyards cases, although the facility is regulated by the Secretary, such regulation is not pervasive and provides no grounds for the invocation of primary jurisdiction. There, as here, the regulatory scheme simply did not comprehend the antitrust conduct before the Court.

III. THE DISTRICT COURT'S DISPOSITION OF AN ANTITRUST TREBLE DAMAGE CASE WILL NOT DISRUPT THE AGENCY'S ADMINISTRATION OF CONTRACT MARKETS SINCE GROUP BOYCOTTS ARE NOT ARGUABLY LAWFUL UNDER THE COMMODITY EXCHANGE ACT.

The court below found that ". . . the complaint is sufficient to allege a group boycott a per se violation of Section 1 of the Sherman Act." The issue of antitrust liability is not even disputed before this Court since the defendants herein did not file cross-petitions for certiorari.* Moreover, while the Court of Appeals found that the conduct alleged violated the Sherman Act, it did not find that such conduct was arguably lawful under the regulatory

* The Court will note that, at the request of defendant Chicago Mercantile Exchange, certain portions of plaintiff's deposition and exhibits thereto are included in the Appendix. This case, however, was appealed from a judgment of the district court *on the pleadings*. The Court of Appeals held that the district court did not have before it a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure.

scheme. The court below merely observed that the Secretary could decline to report the matter for prosecution as a "minor violation" of the Commodity Exchange Act. Such an expression of disinterest by the Secretary neither determines antitrust liability nor legalizes the boycott under the Act. Thus, the lack of any regulatory justification for a boycott precludes application of primary jurisdiction. *Carnation Co.* v. *Pacific Westbound Conference,* 383 U.S. 213, 221-222 (1966); *Allied Air Freight, Inc.* v. *Pan American World Airways,* 393 F.2d 441 (2d Cir., 1968), *cert. denied,* 393 U.S. 846 (1968); *Marnell* v. *United Parcel Service of America, Inc.,* 260 F. Supp. 391 (N.D. Cal., 1966); *Breen Air Freight, Ltd.* v. *Air Cargo, Inc.,* 1971 C.C.H. Tr. Cases, ¶73,775, (S.D.N.Y., 1971).

Moreover, plaintiff brought suit not to enjoin future conduct, but for damages for a past antitrust violation not excused by any other statute. This Court has recognized that such cases are within the province of the district courts. In *Carnation,* the shipper-plaintiff sought treble damages from shipping conferences which allegedly violated antitrust laws by maintaining shipping rate increases for evaporated milk pursuant to ratemaking agreements which had not been approved by the Federal Maritime Commission. The Court distinguished its earlier decisions in *Far East Conference* v. *United States,* 342 U.S. 570 (1952) and *United States Navigation Co.* v. *Cunard S.S. Co.,* 284 U.S. 474 (1932), where plaintiffs had sought to *enjoin* implementation of unapproved agreements, thereby creating the possibility of conflict between the courts and the FMC. As stated by this Court:

> *"The award of treble damages for past and completed conduct which clearly violated the shipping act would certainly not interfere with any future action of the Commission.* Although the Commission can ap-

prove prospective operations under agreements which have been implemented without approval, respondents concede that the Commission has no power to validate pre-approval implementation of such agreements. Therefore the *Far East* and *Cunard* principles only preclude courts from awarding treble damages when the defendants' conduct is arguably lawful under the Shipping Act." 383 U.S. at 222, emphasis supplied)

The impropriety of primary reference to an administrative agency is demonstrated by the decision of the Court of Appeals for the Second Circuit in *Allied Air Freight, Inc.* v. *Pan American World Airways, Inc.*, 393 F.2d 441 (2d Cir., 1968), *cert. denied*, 393 U.S. 846 (1968). There, the complaint alleged that Pan American had entered into a conspiracy in restraint of trade with Add Air Freight Corp. for the purpose of securing for Add a monopoly on air freight forwarding business between New York and Puerto Rico. In furtherance of the conspiracy, Pan American allegedly denied airplane space to shipments consolidated by plaintiffs and gave undue preference to shipments consolidated by Add. The Court of Appeals vacated a stay order which would have referred the matter to the Civil Aeronautics Board, stating that:

"Since defendants conduct is not arguably lawful under the Federal Aviation Act and plaintiff does not seek injunctive relief, we see no reason why the antitrust action should not proceed." (393 F.2d at 448)

Similarly, in *Marnell* v. *United Parcel Service of America, Inc.*, 260 F.Supp. 391 (N.D. Cal., 1966), the district court in refusing a stay of private treble damage proceedings pending reference to the Interstate Commerce Commission, stated:

> "There is not present in this case a question of 'debatable legality' in the sense in which that term was used in *Carnation*, i.e., a legality in the sense that the conduct in question might be exempt from the antitrust laws by the regulatory agency under some express or plainly implied provision of the regulatory act." (260 F.Supp. at 412)

In the instant case, the Court of Appeals recognized that defendants' conduct was without "debatable legality" under the Commodity Exchange Act. However, the majority was concerned that since the CEC or the Secretary might consider defendants' actions to be "minor violations", a treble damage award would conflict with an agency decision "in the public interest" not to take the punitive action permissible under the regulatory statute. The Court of Appeals' narrow view disregards this Court's repeated recognition of the role of private treble damage actions in antitrust enforcement. Congress enacted the treble damage provisions in the Clayton Act "not merely to compensate those who have been directly injured, but also to vindicate the important public interest in free competition" *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495, 502 (1969). The Court of Appeals ignored congressional objectives in substituting a nonexistent regulatory objective for a specific statutory right to redress.

Moreover, the Court of Appeals' concept of the relationship between "public interest" and the antitrust laws in primary jurisdiction cases does not square with this Court's decisions. For nearly thirty years, this Court has held that, in absence of a specific exemption, the concept of "public interest" in regulatory statutes is not so comprehensive as to exclude judicial determination of antitrust issues by federal courts. *California* v. *Federal Power*

Commission, 369 U.S. 483, 485 (1962); *United States* v. *Radio Corporation of America*, 358 U.S. at 334, 351 (1959); *National Broadcasting Company* v. *United States*, 319 U.S. 190, 222-225 (1943). As stated by this Court in *California* v. *Federal Power Commission*:

> "Here, as in *United States* v. *Radio Corporation of America*, 358 U.S. 334 . . . while 'antitrust considerations' are relevant to the issue of 'public interest, convenience, and necessity' (id. 358 U.S. at 351), there is no 'pervasive regulatory scheme' (ibid.) including the antitrust laws that has been entrusted to the Commission." (369 U.S. at 485)

In this case, regardless of whether the Secretary chooses "in the public interest" to classify group boycotts as a minor violation, the antitrust liability remains unaltered. Since the Secretary does not have the power to immunize or even determine antitrust issues, it must be decided by the tribunal authorized by Congress to do so. The conduct in question injured the business of plaintiff and, regardless of the Secretary's feeling in the matter, Congress has given Ricci a statutory action by which he may vindicate his rights.

IV. THE ADMINISTRATIVE AGENCY CANNOT GRANT RICCI THE RELIEF WHICH HE SOUGHT.

The agency's limitations in the field of antitrust enforcement are matched by its statutory incompetence to grant treble damage relief and its exclusion of private parties from the administrative process. Only the Secretary may institute proceedings by the issuance of a complaint; such proceedings "will not be instituted upon pleadings filed by private persons." Title 17, C.F.R. §§0.3(c), 0.53(c). Ricci may apply for the institution of administrative proceedings before the Secretary and/or the CEC, Title 17, C.F.R.

§§0.3(a), 0.53(a), but would "have no legal status in the proceeding which may be instituted", unless permitted by the Secretary to intervene. Title 17, C.F.R. §§0.3(b), 0.53(b). Intervention by private persons is limited to presenting arguments and evidence. The injured party has no right to seek damages before the agency. Thus, reference to an impotent agency only frustrates and delays Ricci's right to his day in court. Clearly, such a result was never intended by Congress. *Allied Air Freight, Inc.* v. *Pan American World Airways, Inc.*, 393 F.2d 441 (2d Cir., 1928), *cert. denied*, 393 U.S. 846 (1968); *Trans World Airlines* v. *Hughes*, 214 F. Supp. 106 (S.D.N.Y., 1963), *aff'd*, 332 F.2d 602 (2d Cir., 1964); *Breen Air Freight Ltd.* v. *Air Cargo, Inc., et al.*, 1971 CCH Trade Cas. ¶73,775 (S.D.N.Y., 1971).

In *Trans World Airlines* v. *Hughes*, the district court held that although the acquisition of an airline by an aircraft supplier had been approved by the Civil Aeronautics Board, the supplier was not thereby immunized from a treble damage action charging the supplier with monopolizing the sale and lease of aircraft and conspiring to finance only purchases of its aircraft by the acquired airline. The court stated:

> "Furthermore, the Board has no power to award damages, and we do not reach the statement of accord in Panagra [Pan American World Airways, Inc. v. United States, 371 U.S. 296 (1963)] to the effect that since the Board's essential regulatory powers deal with division of territories, etc., then Congress must have intended to give it authority that was ample to deal with the evil at hand. *Rather, the statement by the court that a court has jurisdiction under the anti-trust laws if the agency has no power to grant relief is controlling here.*" (214 F.Supp. at 111-112, emphasis supplied).

On appeal, the Court of Appeals for the Second Circuit (332 F.2d 602) stated in affirming that Congress has not relegated the alleged unlawful transactions to CAB determination hence there was no basis for depriving federal courts of jurisdiction. Moreover, the court found no necessity for a uniformity of policy with respect to the transactions in question nor was the board more qualified to consider such charges than were the federal courts ". . . which daily encounter and resolve antitrust problems."

In *Allied Air Freight, Inc.* v. *Pan American World Airways, Inc.*, 393 F.2d 441 (2d Cir., 1968), the Court of Appeals in refusing primary reference to the Civil Aeronautics Board found that the Board had no power to award damages for unfair competitive practices. In *Denver Petroleum* v. *Shell Oil Co.*, 306 F.Supp. 289 (D.Colo., 1969), the court held that the failure of a crude oil dealer to seek administrative relief following the refusal of an integrated oil company to transport oil through its pipeline system did not bar an antitrust action. Defendant's refusal to transport crude oil in a pipeline subject to the common carrier obligations of Section 28 of the Mineral Leasing Act constituted part of the charge of monopolization. There was, however, no administrative power to enforce compliance with the act or exempt pipelines from its provisions. The court held that defendant's invocation of the doctrine of primary jurisdiction was inappropriate, stating:

> "That the section leaves only the express remedy for violation in the hands of the courts makes it clear that the determination of a violation is regarded as being within the judicial competence." (306 F.Supp. at 304).

In the instant case, the administrative agency is without power, either express or implied, to afford plaintiff any

remedy. Only the courts are available to him as a forum. In these circumstances, abdication of judicial responsibility will merely hinder, delay and restrict plaintiff's statutory remedy. The late Mr. Justice Frankfurter, dissenting in *Meat Cutters Union* v. *Jewel Tea Co.*, 381 U.S. 676, 686 (1965), stated:

> ". . . the doctrine of primary jurisdiction is not a doctrine of futility; it does not require resort to 'an expensive and merely delaying administrative proceeding when the case must eventually be decided on a controlling legal issue wholly unrelated to determinations for the ascertainment of which the proceeding was sent to the agency.'" (381 U.S. at 686)

In the instant case, the administrative agency has neither the authority, competence nor power to determine antitrust questions or provide relief to injured private parties. Hence, deference to the administrator is beyond the requirements of the statute which created the agency and can serve only to delay Ricci's right to redress.

CONCLUSION

By virtue of the foregoing, petitioner respectfully prays that the judgment of the court below be reversed and the cause remanded for further proceedings.

Respectfully submitted,

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ADDENDUM

The Commodity Exchange Act (7 U.S.C. § 1, et seq.) provides in pertinent part:

1. Short title

This chapter may be cited as the "Commodity Exchange Act." Sept. 21, 1922, c. 369, § 1, 42 Stat. 998; June 15, 1936, c. 545, § 1, 49 Stat. 1491.

§ 7. Designation of board of trade as "contract market"; conditions and requirements

The Secretary of Agriculture is hereby authorized and directed to designate any board of trade as a "contract market" when, and only when, such board of trade complies with and carries out the following conditions and requirements:

(a) When located at a terminal market where any cash commodity of the kind specified in the contracts of sale of commodity for future delivery to be executed on such board is sold in sufficient volumes and under such conditions as fairly to reflect the general value of the commodity and the differences in value between the various grades of such commodity, and where there is available to such board of trade, official inspection service approved by the Secretary of Agriculture for the purpose: *Provided,* That any board of trade not so located shall be designated as a "contract market" if such board of trade provides for the delivery of commodities on such contracts at a delivery point or points and upon terms and conditions approved by the Secretary of Agriculture.

(b) When the governing board thereof provides for the making and filing by the board or any member thereof, as the Secretary of Agriculture may direct, or reports in accordance with the rules and regulations, and in such manner and form and at such times as may be prescribed

by the Secretary of Agriculture, showing the details and terms of all transactions entered into by the board, or the members thereof, either in cash transactions or transactions for future delivery consummated on or subject to the rules of a board of trade, or transactions for future delivery, and when such governing board provides, in accordance with such rules and regulations, for the keeping of a record by the board or the members of the board of trade, as the Secretary of Agriculture may direct, showing the details and terms of all cash and future transactions entered into by them, consummated on or subject to the rules of a board of trade, such record to be in permanent form, showing the parties to all such transactions, including the persons for whom made, any assignments or transfers thereof, with the parties thereto, and the manner in which said transactions are fulfilled, discharged or terminated. Such record shall be required to be kept for a period of three years from the date thereof, or for a longer period if the Secretary of Agriculture shall so direct, and shall at all times be open to inspection of any representative of the United States Department of Agriculture or United States Department of Justice.

(c) When the governing board thereof provides for the prevention of dissemination by the board or any member thereof of false or misleading or knowingly inaccurate reports concerning crop or market information or conditions that affect or tend to affect the price of commodity in interstate commerce.

(d) When the governing board thereof provided for the prevention of manipulation of prices and the cornering of any commodity by the dealers or operators upon such board.

(e) When the governing board thereof does not exclude from membership in and all privileges on such board of trade any duly authorized representative of any lawfully formed and conducted cooperative association of producers having adequate financial responsibility which is engaged in any cash commodity business, if such association

has complied, and agrees to comply, with such terms and conditions as are or may be imposed lawfully on other members of such board: *Provided,* That no rule of a contract market shall forbid or be construed to forbid the return on a patronage basis by such cooperative association to its bona fide members of moneys collected in excess of the expense of conducting the business of such association.

(f) When the governing board provides for making effective the final orders or decisions entered pursuant to the provisions of section 9 of this title, and the orders issued pursuant to the provisions of section 7a of this title, and for compliance in all other respects with the requirements applicable to such board of trade under this chapter.

As amended Feb. 19, 1968, Pub.L. 90-258, §§ 10, 11, 82 Stat. 29.

§ 7a. Duties of contract markets

Each contract market shall—

By-laws, rules, etc.; furnishing copies to Secretary

(1) Promptly furnish the Secretary of Agriculture copies of all by-laws, rules, regulations, and resolutions made or issued by it or by the governing board thereof or any committee, and of all changes and proposed changes therein;

Access for inspection of books and records

(2) keep all books, records, minutes, and journals of proceedings of such contract market, and its governing board, committees, subsidiaries, and affiliates in a manner that will clearly describe all matters discussed by such contract market, governing board, committees, subsidiaries and affiliates and reveal any action taken in such matters, and allow inspection at all times by any authorized representative of the United States Department of Agriculture or United States Department of Justice of all such books,

records, minutes, and journals of proceedings. Such books, records, minutes, and journals of proceedings shall be kept for a period of three years from the date thereof, or for a longer period if the Secretary of Agriculture shall so direct;

Books and records of warehouses; keeping and inspection

(3) Require the operators of warehouses in which or out of which any commodity is deliverable on any contract for future delivery made on or subject to the rules of such contract market, to make such reports, keep such records, and permit such warehouse visitation as the Secretary of Agriculture may prescribe. Such books and records shall be required to be kept for a period of three years from the date thereof, or for a longer period if the Secretary of Agriculture shall so direct, and such books, records, and warehouses shall be open at all times to inspection by any representative of the United States Department of Agriculture or United States Department of Justice;

Periods of delivery; provisions for

(4) When so directed by order of the Secretary of Agriculture, provide for a period, after trading in contracts of sale of any commodity for future delivery in a delivery month has ceased, during which contracts of sale of such commodity for future delivery in such month may be satisfied by the delivery of the actual cash commodity. Whenever, after due notice and opportunity for hearing, the Secretary of Agriculture finds that provision for such a period of delivery for any one or more commodities or markets would prevent or tend to prevent "squeezes" and market congestion endangering price stability, he shall, by order, require such period of delivery (which shall be not less than three nor more than ten business days) applicable to such commodities and markets as he finds will prevent or tend to prevent such "squeezes" and market congestion: *Provided, however,* That such order shall not apply to then existing contracts;

Notice of date of intended delivery

(5) Require the party making delivery of any commodity on any contract of sale of such commodity for future delivery to furnish the party obligated under the contract to accept delivery, written notice of the date of delivery at least one business day prior to such date of delivery. Whenever, after due notice and opportunity for hearing, the Secretary of Agriculture finds that the giving of longer notice of delivery is necessary to prevent or diminish unfair practices in trading in any one or more commodities or markets, he shall by order require such longer notice of delivery (which shall be not more than ten business days) applicable to such commodities and markets as he finds will prevent or diminish such unfair practices: *Provided, however,* That such order shall not apply to then existing contracts;

United States standards; conformity of grades to

(6) Require that all contracts of sale of any commodity for future delivery on such contract market shall provide for the delivery thereunder of commodities of grades conforming to United States standards, if such standards have been officially promulgated;

Warehouse receipts as satisfaction of futures contract

(7) Require that receipts issued under the United States Warehouse Act shall be accepted in satisfaction of any futures contract, made on or subject to the rules of such contract market, without discrimination and notwithstanding that the warehouseman issuing such receipts is not also licensed as a warehouseman under the laws of any State or enjoys other or different privileges than under State law: *Provided, however,* That such receipts shall be for the kind, quality, and quantity of commodity specified in such contract and that the warehouse in which the commodity is stored meets such reasonable requirements as may be imposed by such contract market on other warehouses as to location, accessibility, and suitability for warehousing and delivery purposes;

Enforcement of bylaws, etc., relating to trading requirements

(8) enforce all bylaws, rules, regulations, and resolutions, made or issued by it or by the governing board thereof or any committee, which relate to terms and conditions in contracts of sale to be executed on or subject to the rules of such contract market or relate to other trading requirements, and which have not been disapproved by the Secretary of Agriculture pursuant to paragraph (7) of section 12a of this title; and revoke and not enforce any such bylaw, rule, regulation, or resolution, made, issued, or proposed by it or by the governing board thereof or any committee, which has been so disapproved; and

Enforcement of bylaws, etc., providing minimum financial standards and related reporting requirements

(9) enforce all bylaws, rules, regulations, and resolutions made or issued by it or by the governing board thereof or by any committee, which provide minimum financial standards and related reporting requirements for futures commission merchants who are members of such contract market, and which have been approved by the Secretary of Agriculture. As amended Feb. 19, 1968, Pub.L. 90—258, § 12, 82 Stat. 29.

§ 8. Application for designation as "contract market"; suspension or revocation of designation; hearing; review by court of appeals

Any board of trade desiring to be designated a "contract market" shall make application to the Secretary of Agriculture for such designation and accompany the same with a showing that it complies with the conditions of section 7 of this title, and with a sufficient assurance that it will continue to comply with the requirements of such section 7. In the event of a refusal to designate as a "contract market" any board of trade that has made application therefor, such board of trade shall be afforded an opportunity for a hearing before the commission, with the right to appeal an

adverse decision after such hearing to the court of appeals as provided for in other cases in paragraph (a) of this section.

(a) The commission is authorized to suspend for a period not to exceed six months or to revoke the designation of any board of trade as a "contract market" upon a showing that such board of trade is not enforcing or has not enforced its rules of government made a condition of its designation as set forth in section 7 of this title or that such board of trade, or any director, officer, agent, or employee thereof, otherwise is violating or has violated any of the provisions of this chapter or any of the rules, regulations, or orders of the Secretary of Agriculture or the commission thereunder. • • •

§ 13a. Nonenforcement of rules of government or other violations, cease and desist orders against contract markets; punishment; misdemeanor; separate offenses

If any contract market is not enforcing or has not enforced its rules of government made a condition of its designation as set forth in section 7 of this title, or if any contract market, or any director, officer, agent, or employee of any contract market otherwise is violating or has violated any of the provisions of this chapter or any of the rules, regulations, or orders of the Secretary of Agriculture or the commission thereunder, the commission may, upon notice and hearing and subject to appeal as in other cases provided for in paragraph (a) of section 8 of this title, make and enter an order directing that such contract market, director, officer, agent, or employee shall cease and desist from such violation, and if such contract market, director, officer, agent, or employee thereafter and after the lapse of the period allowed for appeal of such order or after the affirmance of such order, shall fail or refuse to obey or comply with such order, such contract market, director, officer, agent, or employee shall be guilty of a misdeameanor and, upon conviction thereof, shall be fined not less than $500 nor more than $10,000 or imprisoned

for not less than six months nor more than one year, or both. Each day during which such failure or refusal to obey such order continues shall be deemed a separate offense. As amended Feb. 19, 1968, Pub.L. 90—258, § 18, 82 Stat. 31.

• • •

§ 13c. Responsibility as principal; minor violations

(a) Any person who commits, or who willfully aids, abets, counsels, commands, induces, or procures the commission of, a violation of any of the provisions of this chapter, or any of the rules, regulations, or orders issued pursuant to this chapter, or who acts in combination or concert with any other person in any such violation, or who willfully causes an act to be done or omitted which if directly performed or omitted by him or another would be a violation of the provisions of this chapter or any of such rules, regulations, or orders may be held responsible in administrative proceedings under this chapter for such violation as a principal.

(b) Nothing in this chapter shall be construed as requiring the Secretary of Agriculture or the commission to report minor violations of this chapter for prosecution, whenever it appears that the public interest does not require such action.

Sept. 21, 1922, c. 369, § 13, as added Feb. 19, 1968, Pub.L. 90—258, § 26, 82 Stat. 34.

Title 17 C.F.R.

Part 0—Rules of Practice Under the Commodity Exchange Act

Subpart A—Rules Applicable to Proceedings Before the Secretary of Agriculture

Sec. 0.0 Scope and applicability of rules of practice. Sections 0.1-0.22, inclusive, of this subpart shall apply to the conduct of all disciplinary proceedings as hereinafter defined in paragraph (j) of sec. 0.2.

Sections 0.1, 0.2, and 0.23-0.27, inclusive, of this subpart shall apply to the conduct of all rulemaking proceedings as hereinafter defined in paragraph (k) of sec. 0.2.

Sec. 0.1 Meaning of words. Words in this subpart in the singular form shall be deemed to import the plural, and vice versa, as the case may demand.

Sec. 0.2. Definitions. As used in this subpart, the terms as defined in section 2 of the Act shall apply with equal force and effect. In addition, and except as may be provided otherwise herein:

(a) The term "Act" means the Commodity Exchange Act, approved September 21, 1922 (42 Stat. 998); as amended June 15, 1936 (49 Stat. 1491; 7 U.S.C. 1-17a), and other legislation supplementary thereto and amendatory thereof;

Rules Applicable to Disciplinary Proceedings

Sec. 0.3 Institution of proceedings—(a) *Application to institute proceedings.* Any interested person having any information of any violation of the Act, or of any of the regulations promulgated thereunder, by any person (other than a contract market) may file with the Act Administrator an application requesting the institution of such proceeding as is authorized under the Act. Such application shall be in writing, signed by or on behalf of the applicant, and shall include a short and simple statement of the facts constituting the alleged violation and the name and address of the applicant and the name and address of the person against whom the applicant complains.

(b) *Status of applicant.* The person filing an application as described in paragraph (a) of this section shall have no legal status in the proceeding which may be instituted as a result of the application, except where the applicant may be permitted to intervene therein, in the manner hereinafter provided, or may be called as a witness, and the applicant's identity shall not be divulged by any employee of the Department, except with the applicant's prior consent or upon court order.

(c) *Who may institute.* If, after investigation of the matters complained of in the application described in paragraph (a) of this section, or after investigation made on his own motion, the Secretary "has reason to believe that any person (other than a contract market) is violating or has violated any of the provisions of the Act, or any of the rules and regulations made pursuant to its requirements, or has manipulated or is attempting to manipulate the market price of any commodity, in interstate commerce, or for future delivery on or subject to the rules of any board of trade,"[1] he will institute a proceeding: *Provided,* That in any case, except one of willfulness or one in which the public health, interest or safety otherwise requires, prior to the institution of a proceeding for the suspension or revocation of a registration or license, facts or conditions which may warrant such action shall be called, in writing, to the attention of the person complained against, and such person shall be accorded opportunity to demonstrate or achieve compliance with all lawful requirements. Proceedings will be instituted only upon complaints issued by the Secretary and will not be instituted upon pleadings filed by private persons.

Subpart B—Rules Applicable to Proceedings Before the Commodity Exchange Commission

Sec. 0.50 Scope and applicability of rules of practice. Sections 0.51-0.72, inclusive, of this subpart shall apply to the conduct of all disciplinary proceedings as hereinafter defined in sec. 0.52. Sections 0.51, 0.52, and 0.73-0.77, inclusive, shall apply to the conduct of all rulemaking proceedings as hereinafter defined in sec. 0.52. Sections 0.51, 0.52 and 0.78-0.95, inclusive, shall apply to the conduct of all 6a proceedings as hereinafter defined in sec. 0.52.

Sec. 0.51 Meaning of words. Words in this subpart in the singular form shall be deemed to import the plural, and vice versa, as the case may demand.

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[1] Words in quotation marks in sec. 0.3(c) are from sec. 6(b) of the Commodity Exchange Act (7 U.S.C. 9).

Sec. 0.52 Definitions. As used in this subpart, the terms as defined in section 2 of the Act shall apply with equal force and effect. In addition, and except as may be provided otherwise in this subpart:

(a) The term "Act" means the Commodity Exchange Act, approved September 21, 1922 (42 Stat. 998), as amended June 15, 1936 (49 Stat. 1491; 7 U.S.C. 1-17a), and other legislation supplementary thereto and amendatory thereof;

Rules Applicable to Disciplinary Proceedings

Sec. 0.53 *Institution of Proceedings*—(a) *Application to institute proceedings.* Any interested person having any information of any violation of the Act, or of any of orders or regulations promulgated thereunder, by any board of trade or by any director, officer, agent, or employee thereof may file with the Act Administrator an application requesting the institution of such proceeding as is authorized under the Act. Such application shall be in writing, signed by or on behalf of the apllicant, and shall include a short and simple statement of the facts constituting the alleged violation and the name and address of the applicant and the name and address of the person against whom the applicant complains.

(b) *Status of applicant.* The person filing an application as described in paragraph (a) of this section shall have no legal status in the proceeding which may be instituted as a result of the application, except where the applicant may be permitted to intervene therein, in the manner hereinafter provided, or may be called as a witness, and applicant's identity shall not be divulged by any employee of the Department, except with the applicant's prior consent or upon court order.

(c) *Who may institute.* If, after investigation of the matters complained of in the application described in paragraph (a) of this section, or after investigation made on its own motion, the Commission has reason to believe that

any board of trade or any director, officer, agent, or employee thereof has violated or is violating any of the provisions of the Act, or of any of the regulations promulgated thereunder, the Commission will institute an appropriate proceeding: *Provided,* That in any case, except one of willfulness or one in which the public health, interest or safety otherwise requires, prior to the institution of a proceeding for the suspension or revocation of any designation of a contract market, facts or conditions which may warrant such action shall be called to the attention of the market in writing and such market shall be accorded opportunity to demonstrate or achieve compliance with all lawful requirements. Proceedings will be instituted only upon complaints issued by the Commission and will not be instituted upon pleadings filed by private persons.

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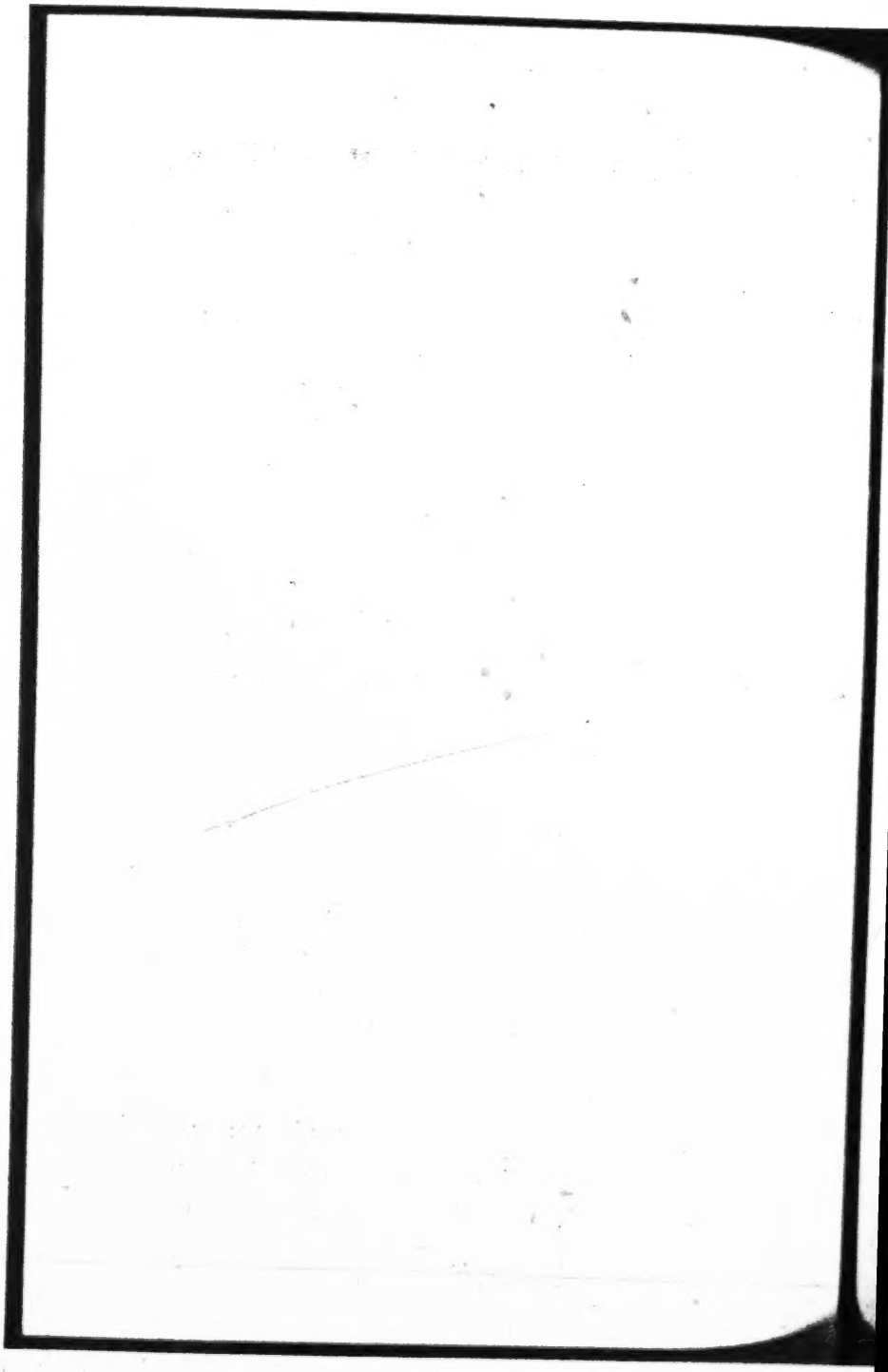

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-858

THOMAS RICCI, PETITIONER

v.

CHICAGO MERCANTILE EXCHANGE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*

OPINIONS BELOW

The opinion of the court of appeals (App. 32-45) is reported at 447 F.2d 713. The district court rendered no opinion in dismissing the complaint (App. 22).

JURISDICTION

The judgment of the court of appeals was entered on June 17, 1971, and a timely petition for rehearing was denied on October 5, 1971 (App. 53). The

petition for a writ of certiorari was filed on January 3, 1972, and was granted on February 28, 1972 (405 U.S. 953). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in a private treble-damage antitrust action alleging that a commodity exchange and others violated Section 1 of the Sherman Act, 15 U.S.C. 1, the doctrine of primary jurisdiction must be applied to permit the Secretary of Agriculture or the Commodity Exchange Commission to consider whether the defendants violated the Commodity Exchange Act or the rules of the defendant commodity exchange.

STATUTE INVOLVED

The pertinent provisions of the Commodity Exchange Act, 7 U.S.C. 1, *et seq.*, are set forth in the addendum to petitioner's brief on the merits.

INTEREST OF THE UNITED STATES

This case raises an important question concerning the proper scope of the doctrine of primary jurisdiction in antitrust cases. The United States is interested in maintaining the proper division of responsibility between regulatory agencies and the federal courts in the antitrust area, since an improper application of the primary jurisdiction doctrine could seriously impede the enforcement of the fundamental national economic policy which is expressed in federal

antitrust laws. In addition, a number of cases are pending in the lower federal courts, including one filed by the United States,[1] which involve antitrust claims concerning practices in the commodities trading business and which are likely to be affected by the decision in this case.

STATEMENT

This private treble-damage antitrust suit was brought by petitioner against respondents—the Chicago Mercantile Exchange (a commodity exchange under the Commodity Exchange Act, 7 U.S.C. 1 *et seq.*), three of its officers, Siegel Trading Co., a member firm of the Exchange, and the president of Siegel Trading—to recover damages allegedly suffered by petitioner from cancellation of his membership and trading privileges in the Exchange. The complaint alleged that respondents had violated Section 1 of the Sherman Act, 15 U.S.C. 1, by conspiring to prevent petitioner from maintaining his membership in the Exchange, and had transferred his membership in violation of the rules of the Exchange (App. 6-20).[2]

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[1] *United States* v. *Board of Trade of City of Chicago* (N.D. Ill., No. 71 C 2875).

[2] Exchange Rule 307 states that a membership can be transferred or sold only when the member signs an authorization to transfer. If the transfer of petitioner's membership was invalid, it would appear he was also improperly denied trading privileges on the Exchange in violation of Rule 322. Paragraph 10 of the complaint sets forth the rules involved here (App. 8-10).

Specifically, the complaint alleged that Siegel induced the Exchange to transfer petitioner's membership to a third party by use of a blank authorization to transfer membership that petitioner had executed in October 1967, but subsequently had revoked (App. 13). The transfer allegedly took place without notice and hearing, and without consideration of petitioner's claim, known to the Exchange, that a debt he owed to Siegel was more than offset by a debt owed by Siegel to petitioner. As a result, petitioner alleged, he was unable to conduct his business until he purchased a new membership in the Exchange (App. 11-13).[3]

The district court dismissed the complaint without stating any reasons (App. 22). The court of appeals treated the dismissal as based on failure to state a cause of action under Section 1 of the Sherman Act and reversed.[4] The court first held that "absent any justification from the Exchange's status as a board of trade and a designated 'contract market,' the complaint is sufficient to allege a group boycott, a *per se*

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[3] The complaint also alleged tortious interference with advantageous commercial relationships, in violation of Illinois law (App. 16-20).

[4] Although the district court had ordered certain depositions taken prior to ruling on respondents' motion to dismiss, the court of appeals found that the district court had not considered the deposition testimony (reproduced in part at App. 23-31) in dismissing the complaint (App. 34-35). Accordingly, for the purposes of reviewing the dismissal, the court of appeals also disregarded the testimony and took the factual allegations in the complaint as true (App. 35).

violation of section 1 of the Sherman Act" (Pet. App. 10a).

The court held, however, with one dissent, that under the doctrine of primary jurisdiction the antitrust proceedings should be stayed until the Commodity Exchange Commission or the Secretary of Agriculture passed on the validity of the defendants' conduct under the rules of the Exchange and the Commodity Exchange Act, 7 U.S.C. 1, *et seq.* (App. 37-45). The court ruled that the facts alleged in the complaint in support of the antitrust charge also constituted violations of Exchange rules which the Commission or the Secretary could investigate (App. 41).

The dissent noted that although the Commission and the Secretary might be able to determine whether there had been violations of Exchange rules, they had no jurisdiction to decide antitrust issues. The dissent also stated that the district court was just as competent as either the Commission or the Secretary to resolve the factual questions involved in the antitrust complaint (App. 45-52).

ARGUMENT

Introduction and Summary

In ordering the district court to stay its consideration of petitioner's antitrust suit until the Secretary of Agriculture or the Commodity Exchange Commission considers the challenged conduct underlying the suit, the court of appeals concluded that at least some of the issues raised were within the primary juris-

diction of the Secretary or the Commission. In our view, this conclusion is unwarranted and is based on a faulty and incomplete analysis of the factors which must be considered in determining whether the primary jurisdiction of an agency should be invoked.

We begin in Part I with a general discussion of the doctrine of primary jurisdiction—its effect when invoked, its development over the years and its specific application in antitrust cases. The fundamental purpose of the doctrine is to allocate between courts and agencies the authority to determine various factual and legal issues. For the most part, the doctrine does not merely determine which forum should consider a given issue in the first instance, but actually allocates the decisional authority with respect to that issue.

The doctrine of primary jurisdiction has its roots in railroad rate cases in which this Court ruled that the Interstate Commerce Commission alone was competent to pass on the reasonableness of rates. See *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426. The early cases cited the need for uniformity as the basis for the doctrine, but later cases stressed the need for agency expertise in the resolution of certain issues. Further refinement revealed that expertise, while an important factor, was insufficient standing alone to warrant invocation of the doctrine. With respect to many issues within an agency's jurisdiction, for example, the courts might be equally competent and specifically authorized to act. And while an agency may possess relevant ex-

pertise, the absence of an agency procedure to consider a controversy would be determinative. Thus, application of the doctrine of primary jurisdiction requires an examination of the particular regulatory scheme involved and a determination whether the exercise of normal judicial jurisdiction would interfere substantially with the administration of the scheme.

In antitrust cases involving the conflicting jurisdictional claims of courts and regulatory agencies, this Court has focused sharply on the character of the regulatory scheme. From a series of cases, the test has emerged that only where a regulatory scheme is "pervasive" and empowers an agency either to grant effective relief against antitrust violations or to immunize such conduct from the operation of the antitrust laws, should the court in which the suit was instituted defer to the jurisdiction of the agency.

In Part II of our argument, we apply the general principles developed in Part I to this case. First, the Commodity Exchange Act does not embody a pervasive regulatory scheme, but is concerned solely with the prevention of manipulation and unsound practices in commodities trading. The limited nature of the regulation is particularly apparent when the Act is compared with other regulatory statutes where primary jurisdiction has been applied in antitrust cases. Moreover, under the Act, neither the Secretary nor the Commission has broad or relevant powers to remedy antitrust violations or authority to immunize any practices from the operation of the antitrust laws.

In addition, other criteria for invoking the primary jurisdiction of an agency are not satisfied here. No need for agency expertise has been shown, since the issues raised concerning the validity of the transfer of petitioner's membership in the Chicago Mercantile Exchange are issues the district court is competent to consider. There has been no showing that judicial resolution of the issues will interfere with the administration of the Commodity Exchange Act. Finally it is doubtful whether a procedure exists under the Commodity Exchange Act whereby the Secretary of Agriculture or the Commodity Exchange Commission could consider any of the contentions raised by petitioner in his antitrust suit.

I. THE DOCTRINE OF PRIMARY JURISDICTION IS APPLIED IN AN ANTITRUST CASE INVOLVING A REGULATED INDUSTRY ONLY IF THE REGULATORY SCHEME IS PERVASIVE AND THE REGULATORY AGENCY HAS POWER TO GRANT EFFECTIVE RELIEF AGAINST THE ALLEGED ANTITRUST VIOLATION OR TO IMMUNIZE THE CONDUCT FROM THE OPERATION OF THE ANTITRUST LAWS

A. The Meaning and Application of the Doctrine

1. The doctrine of primary jurisdiction has been developed over the years in an attempt to allocate between courts and agencies, when their jurisdictions overlap, the authority to determine various factual and legal issues. While recognizing the legitimate role of the courts in resolving basic commercial disputes and in enforcing the antitrust laws, the doctrine also seeks to prevent unnecessary interference with the op-

eration of regulatory schemes enacted by Congress to be administered by regulatory agencies. Although sometimes described as merely requiring "preliminary resort" to an agency, *Far East Conference* v. *United States*, 342 U.S. 570, 574-575, the doctrine, when applied, more usually operates to give an agency the conclusive authority, subject only to normal judicial review, to determine at least some of the issues in a proceeding. As this Court has noted, application of the doctrine "does 'more than prescribe the mere procedural time table of the lawsuit. It is a doctrine allocating the law-making power over certain aspects' of commercial relations. 'It transfers from court to agency the power to determine' some of the incidents of such relations." *United States* v. *Western Pacific R. Co.*, 352 U.S. 59, 65, quoting Jaffe, *Primary Jurisdiction Reconsidered*, 102 U. Pa. L. Rev. 577, 583-584 (1954).

Normally, when an agency's primary jurisdiction is properly invoked prior to an agency determination, the court in which the case was instituted should stay the proceeding until the agency has acted. See, *e.g.*, *Port of Boston Marine Terminal Ass'n* v. *Rederiaktiebolaget Transatlantic*, 400 U.S. 62.[5] When the agen-

[5] In certain circumstances, a court may be required to dismiss rather than to stay a proceeding even though the agency's determination may not dispose of all the issues in the lawsuit. In *Far East Conference* v. *United States*, 342 U.S. 570, a court was asked to enjoin activities which the Federal Maritime Commission might have power to immunize from the operation of the antitrust laws. Although the court could have granted the injunction if the Federal Maritime Commission

cy has power to determine all the issues in the proceeding, however, the court should dismiss the case since upon conclusion of the agency's determination, there would be nothing further for the court to decide. See, *e.g.*, *Pan American Airways, Inc.* v. *United States*, 371 U.S. 296. In such cases, the agency may be said to have exclusive rather than primary jurisdiction.

Although the typical primary jurisdiction case involves a deferral of judicial action for an agency determination, the primary jurisdiction doctrine may be invoked after, as well as before, the conclusion of an agency proceeding. In such cases, the party invoking the doctrine may contend that the prior agency decision has already determined some of the issues in the judicial proceeding and that the court is required to follow that determination. See, *e.g.*, *United States* v. *Radio Corporation of America*, 358 U.S. 334.

In short, the usual effect of deferring to an agency's primary jurisdiction is to deprive the court of authority to make a *de novo* determination of the issues referred and to channel judicial consideration of the issues to appellate review of the agency' decision—

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decided not to immunize the conduct, the court was required to dismiss the suit. A stay was deemed unnecessary in these circumstances because the injunction suit could easily be reinstituted if appropriate. 342 U.S. at 576-577. See also *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213, 222-223. This Court later concluded, in reviewing a subsequent Commission decision through normal channels of judicial review, that the Federal Maritime Commission did not have power to immunize the challenged activities. *Federal Maritime Board* v. *Isbrandsten Co.*, 356 U.S. 481.

generally by a different court. See *Port of Boston, supra; United States* v. *Philadelphia National Bank*, 374 U.S. 321, 353-354. In part because of this significant effect on a court's power, the doctrine of primary jurisdiction—in contrast to the requirement that administrative remedies be exhausted before judicial relief can be sought—cannot be mechanically applied. Rather, a court must determine "whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation." *United States* v. *Western Pacific R. Co., supra*, 352 U.S. at 64.

2. The doctrine of primary jurisdiction has its roots in *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426. In that case, a shipper had brought an action in a state court against a railroad contending that the rates charged by the railroad were unreasonable. This Court held that the action was barred since Congress had given the Interstate Commerce Commission the exclusive authority to determine the reasonableness of rates; judicial interference would destroy the uniformity in rates envisioned by Congress.

In subsequent cases, the Court has emphasized the need to obtain the expert knowledge of the agency in resolving "issues of fact not within the conventional experience of judges" rather than the need for uniformity as a reason for applying the doctrine. *Far East Conference* v. *United States*, 342 U.S. 570, 574; *United States* v. *Western Pacific R. Co., supra*, 352

U.S. at 64-65. In *Western Pacific*, for example, the Court held that where words in a tariff are used in a technical sense and their construction requires a weighing of conflicting evidence and a familiarity with transportation policies, it is for the Interstate Commerce Commission, rather than the courts, to construe the words. 352 U.S. at 65-66.

A determination that an agency has expertise with respect to a given issue, however, does not necessarily mean that the agency has primary jurisdiction over that issue. The courts may be equally competent to resolve it. See *e.g.*, *Local Union No. 189* v. *Jewel Tea Co.*, 381 U.S. 676, 684-687 (opinion of Mr. Justice White). In some cases, Congress may have created a statutory right of action under which the courts have authority to decide certain matters without prior resort to an agency, notwithstanding the fact that the agency may itself have parallel jurisdiction over and special expertise concerning the subject. Thus, the federal district courts have jurisdiction under Section 301 of the Labor-Management Relations Act over suits by and against labor organizations relating to conduct which also is subject to the jurisdiction of the National Labor Relations Board because it is an unfair labor practice. See, *e.g.*, *Vaca* v. *Sipes*, 386 U.S. 171, 176-188; *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261; *Smith* v. *Evening News Association*, 371 U.S. 195; cf. *J.I. Case Co.* v. *Borak*, 377 U.S. 426.

Application of the doctrine of primary jurisdiction is inappropriate, regardless of agency expertise, where

no agency procedure exists for resolving a given issue before a court. Thus, in *Silver* v. *New York Stock Exchange*, 373 U.S. 341, a case involving a challenge under the antitrust laws to an order of the New York Stock Exchange requiring certain member brokers to discontinue direct wire communications with the plaintiff, the Court noted that there was no question whether the plaintiff was required to resort to the Securities and Exchange Commission for relief before coming into court, since the Commission had no "jurisdiction to review particular instances of enforcement of exchange rules." 373 U.S. at 357-358. See also, *Local Union No. 189* v. *Jewel Tea Co.*, *supra*, 381 U.S. at 687-688 (opinion of Mr. Justice White).

The decision whether the doctrine of primary jurisdiction applies requires a careful analysis of the regulatory scheme administered by the agency and a determination whether resolution of a particular issue by the courts will unduly interfere with such administration. Thus, in *Western Pacific*, *supra*, a technical tariff construction issue was referred to the Interstate Commerce Commission not merely because the Commission has expertise in tariff construction matters, but also because the Court concluded that in enacting the Interstate Commerce Act, Congress intended the Commission to consider important issues of transportation policy in the first instance. 352 U.S. at 65. In the words of one commentator (Jaffe, *Primary Jurisdiction*, 77 Harv. L. Rev. 1037, 1040-1041 (1964): "It is not merely the presence of expertness, but the wide-reaching and systematic character

of agency regulation which tends to choke out the normal jurisdiction of the courts."

B. The Application of the Doctrine in Antitrust Cases

In antitrust cases involving conflicting jurisdictional claims between courts and regulatory agencies, this Court has held that, in view of the fundamental nature of the antitrust laws and the role of the courts in enforcing them, a court should defer to an agency only if the agency has "pervasive" regulatory authority over the industry involved, including the power either to grant effective relief against conduct which violates basic antitrust policies or to immunize such conduct from the operation of the antitrust laws. Where there is such "pervasive" regulatory authority, the Court has concluded that particular remedies of the antitrust laws have been superseded by the regulatory statute in question. See *United States Navigation Co.* v. *Cunard Steamship Co.*, 284 U.S. 474, 485; *Pan American World Airways* v. *United States*, 371 U.S. 296, 304-305.

In three leading cases involving the broadcasting, natural gas and banking industries, however, regulatory agencies have been held not to have primary jurisdiction to determine antitrust issues because the respective industries were not subject to "pervasive" regulation. *United States* v. *Radio Corporation of America*, 358 U.S. 334, 350; *California* v. *Federal Power Commission*, 369 U.S. 482, 485; *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 352.

In *Radio Corporation of America*, the Court held that the prior approval by the Federal Communica-

tions Commission of the exchange of television licenses did not bar an antitrust action alleging that the licenses were exchanged in furtherance of a conspiracy to restrain trade. Finding that in enacting the Federal Communications Act, 47 U.S.C. 151 *et seq.*, Congress had not abandoned the principle of free competition in the broadcasting industry and that the scope of Commission approval of the exchange of licenses was limited to a determination whether the exchange furthered the "public interest, convenience, and necessity," the Court held that there was no pervasive regulatory scheme which justified invocation of the doctrine of primary jurisdiction. 358 U.S. at 346-352.

In *California* v. *Federal Power Commission*, this Court held that the Federal Power Commission should stay proceedings to approve a merger under the Natural Gas Act, 15 U.S.C. 717 *et seq.*, until the district court determined the legality of the merger under Section 7 of the Clayton Act. The Court found that the Natural Gas Act did not empower the Commission to adjudicate antitrust issues and concluded that a Commission decision approving the merger while the antitrust suit was pending could have an unwarranted influence on the suit. 369 U.S. at 485-486, 489.

Finally, in *Philadelphia National Bank*, the Court rejected the contention that a judicial proceeding challenging a bank merger under Section 7 of the Clayton Act could not be maintained because the prior approval of the merger by the Controller of the Currency constituted an exercise of the Controller's primary jurisdiction to determine the antitrust aspects of the merger.

In contrast, the Court concluded in *Pan American World Airways* v. *United States*, *supra*, that the Civil Aeronautics Act (now the Federal Aviation Act, 49 U.S.C. 1301 *et seq.*) gave the Civil Aeronautics Board basic and comprehensive regulatory authority over the carriers' limitations of air routes and divisions of territories that were the basis of the antitrust suit, including the power to prohibit unfair methods of competition and to approve those very practices. Accordingly, the Board had primary jurisdiction to consider the challenged conduct and the civil suit was ordered dismissed. 371 U.S. at 313. The Court did not hold, however, that the antitrust laws were entirely displaced with respect to the airline industry: it stated that the enforcement of criminal antitrust laws remained unaffected by the Civil Aeronautics Act and that civil antitrust violations might arise outside the scope of the Act and the Board's primary jurisdiction. 371 U.S. at 305.

Since the scope of the Board's primary jurisdiction to consider anticompetitive conduct was limited in the *Pan American* decision to conduct the Board had power to remedy or to immunize, it follows that statutory authority to remedy or to immunize antitrust violations is an essential element of primary jurisdiction in the antitrust area. This Court so interpreted *Pan American* in its subsequent decision in *Philadelphia National Bank*, *supra*. In holding that the Bank Merger Act, unlike the Civil Aeronautics Act, does not confer primary jurisdiction upon the regulatory agency, the Court observed (374 U.S. at 351):

> * * * In *Pan American*, the Court held that because the Civil Aeronautics Board had been given broad powers to enforce the competitive standard clearly delineated by the Civil Aeronautics Act, and to immunize a variety of transactions from the operation of the antitrust laws, the Sherman Act could not be applied to facts composing the precise ingredients of a case subject to the Board's broad regulatory and remedial powers; in contrast, the banking agencies have authority neither to enforce the antitrust laws against mergers, * * * nor to grant immunity from those laws.[6]

The Court's reluctance to apply primary jurisdiction in antitrust cases unless clearly mandated by the regulatory statute involved reflects the fundamental nature of the antitrust laws. As noted in *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213, 218:

> We have long recognized that the antitrust laws represent a fundamental national economic pol-

[6] An exemption from the antitrust laws may be implied from a statutory scheme even though the agency involved has no jurisdiction to consider the challenged conduct. In such a case, of course, the exemption follows not because an agency has primary jurisdiction, but because Congress in enacting the statute intended to remove the challenged conduct from the operation of the antitrust laws. In *Silver* v. *New York Stock Exchange*, *supra*, for example, where it was acknowledged that the Securities and Exchange Commission had no authority to consider certain challenged conduct (see p. 13, *supra*), the Court held that "[r]epeal [of the antitrust laws] is to be regarded as implied only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary." 373 U.S. at 357. The reconciliation of any conflict between a regulatory scheme and the antitrust laws is a judicial function.

> icy and have therefore concluded that we cannot lightly assume that the enactment of a special regulatory scheme for particular aspects of an industry was intended to render the more general provisions of the antitrust laws wholly inapplicable to that industry. * * *

Although the existence of primary jurisdiction in a regulatory agency does not necessarily involve a repeal of substantive antitrust standards, it limits the judicial remedies which Congress provided to enforce that fundamental national economic policy. This Court avoided this dilemma in the *Philadelphia National Bank* case by holding that under the Clayton Act and the Bank Merger Act of 1960 the banking agencies under the latter and the district court under the former are required independently to consider the anticompetitive effects of the merger.[7] Similarly, in *Carnation*, the Court held that the existence under the Shipping Act of a reparations remedy for overcharges should not preclude the injured party from pursuing its treble damage remedy under the antitrust laws for the same overcharges. In ruling that alternate or even duplicate remedies existed for the same conduct, the Court was simply implementing the congressional purpose to further the fun-

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[7] Congress subsequently expressly incorporated such dual consideration of anticompetitive effects into the Bank Merger Act of 1966, 12 U.S.C. 1828, which requires the agency to determine anticompetitive effects of bank mergers and provides for a subsequent *de novo* judicial determination of such anticompetitive effects under the identical standard.

damental national economic policy of competition by maximizing its enforcement.[8]

Finally, the fact that a court should not defer to a regulatory agency in an antitrust case in the absence of a pervasive regulatory scheme and agency power to remedy or immunize the challenged conduct does not foreclose the court from obtaining the benefit of agency expertise. The court may request the agency to participate as *amicus curiae* or as a party. See *Thill Securities Corp.* v. *New York Stock Exchange*, 433 F. 2d 264 (C.A. 7), certiorari denied, 401 U.S. 994. Agencies also frequently themselves take the initiative in so participating. A district court has also requested, upon a motion of the United States, a report from the Administrator of the Commodity Exchange Authority for use in a pending antitrust proceeding involving the legality of commission rate fixing by a commodity exchange. *United States* v. *Board of Trade of the City of Chicago* (N.D. Ill., No. 71 C 2875).

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[8] Court decisions requiring regulatory agencies to consider anticompetitive effects in administering statutes requiring regulatory approval of particular transactions under the "theory of complementary regulation" provide another example of maximizing enforcement through dual remedies. See *Northern Natural Gas Co.* v. *Federal Power Commission*, 399 F.2d 953 (C.A.D.C.), and cases cited therein. As the court of appeals noted in *Northern Natural Gas*, the existence of a duty to consider anticompetitive effects does not mean that "agencies have jurisdiction to determine violations of the antitrust laws." 399 F.2d at 960. Cf. *United States* v. *Radio Corporation of America*, *supra*, 358 U.S. at 351-352. The existence of a duty to consider anticompetitive effects under the theory of complementary regulation is not a broad power to remedy antitrust violations which would satisfy the requirements for the invocation of the primary jurisdiction doctrine in an antitrust case.

II. THE PRIMARY JURISDICTION DOCTRINE IS INAPPLICABLE IN THIS CASE

A. The Commodity Exchange Act Does Not Create a Pervasive Regulatory Scheme and Does Not Provide for Administrative Authority to Prohibit Conduct Which Violates Antitrust Policies or to Immunize Such Conduct from the Operation of the Antitrust Laws

The Commodity Exchange Act does not embody a "pervasive" regulatory scheme within the meaning of this Court's decisions.[9] The basic purposes of the Act are to protect commerce and the public from the adverse effects of sudden or unreasonable fluctuations in the price of commodities sold on boards of trade; to guarantee fair practices and honest dealings on such markets; and to promote the orderly conduct of future transactions on such markets.[10] The Con-

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[9] The court of appeals conceded that the overall regulatory scheme embodied in the Commodity Exchange Act was less pervasive than the scheme involved in the *Pan American* case (see p. 16, *supra*), but concluded that the specific allegations in petitioner's complaint related to powers of the Secretary and the Commission which are basic to the regulatory scheme (App. 43-44 n. 15). While we do not believe that this is so (see pp. 26-27 *infra*), the court in any event did not find that such powers include the power to remedy antitrust violations. It held only that the Secretary and the Commission could consider antitrust policies—but see p. 19 n. 8 *supra*—and expressly declined to determine whether any administrative authority existed to immunize conduct from the operation of the antitrust laws (App. 42, 45 n. 18).

[10] Section 3 of the Act, 7 U.S.C. 5, notes the large volume and economic importance of commodity transactions and sets forth the findings of Congress that "the transactions and prices of commodity on such boards of trade are susceptible to speculation, manipulation, and control, and sudden or un-

gress which enacted the Act, originally called the Grain Futures Act, was concerned with preventing manipulations of the prices and the "cornering" of the supply of agricultural commodities as had frequently occurred in the late nineteenth century. See *Chicago Board of Trade* v. *Olsen*, 262 U.S. 1.

The major features of the Act reveal its limited scope and purpose to prevent manipulation and unsound practices in futures transactions. A board of trade must register with the Secretary of Agriculture as a "contract market" in order to conduct futures trading, must file required reports with the Secretary, and must provide rules "for the prevention of manipulation of prices and the cornering of any commodity by the dealers or operators" on the market. 7 U.S.C. 7. The Secretary has authority to disapprove a rule of a contract market relating to terms and conditions of contracts of sale or other trading requirements if the rule violates the Commodity Exchange Act or any rule, regulation or order promulgated thereunder. 7 U.S.C. 12a. The Act specifically prohibits certain types of trades which are considered adverse to the public interest. 7 U.S.C.

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reasonable fluctuations in the prices thereof frequently occur as a result of such speculation, manipulation, or control, which are detrimental to the producer or the consumer and the persons handling commodity and products and byproducts thereof in interstate commerce, and such fluctuations in prices are an obstruction to and a burden upon interstate commerce in commodity and the products and byproducts thereof and render regulation imperative for the protection of such commerce and the national public interest therein."

6b, 6c. In addition, the Act requires futures commission merchants and floor brokers to register with the Secretary and to maintain minimum capital requirements and authorizes the Secretary to suspend or revoke the registration of a futures commission merchant or broker who violates the Act or any rules of the Secretary. 7 U.S.C. 6d, 6f, 6g.

The Act also creates the Commodity Exchange Commission, which consists of the Secretary of Agriculture, the Secretary of Commerce and the Attorney General, or their representatives. 7 U.S.C. 2. The Commission is authorized to suspend the designation of a board of trade as a contract market for a period not exceeding six months for violations of the Act or the rules of the Secretary or failure to enforce "its rules of government made a condition of its designation," 7 U.S.C. 8, and to issue cease-and-desist orders to remedy such violations. 7 U.S.C. 13a.

The limited regulation of the commodities industry to prevent price manipulation and cornering and to assure financial responsibility of commission merchants and brokers is in marked contrast to the "pervasive character" of the economic regulation in industries in which the primary jurisdiction doctrine has been applied in antitrust cases. See *United States Navigation Co.* v. *Cunard Steamship Co.*, *supra*; *Keogh* v. *Chicago & N.W. Ry.*, 260 U.S. 156; *Pan American World Airways* v. *United States*, *supra*. The Shipping Act, the Interstate Commerce Act, and the Civil Aeronautics Act (which were in-

volved, respectively, in those cases) all evidence a congressional intent either to limit or restrict competition in particular circumstances under agency supervision or to place definite antitrust powers in the hands of the regulatory agency. Agency authority to restrict competition is expressly provided in the statutes and is not inferred from a general reference to the "purposes" of the statutes.

For example, the Interstate Commerce Act gives the Interstate Commerce Commission power to set "maximum and minimum" rates for interstate rail, water and motor vehicle transportation in conformity with detailed standards. 49 U.S.C. 13(4), 15(1), 15a, 316(c), 318. Rebates are expressly prohibited (49 U.S.C. 2). The Commission also controls entry into the industry and extensions and abandonments of service (49 U.S.C. 1(18), 306), and must approve mergers and consolidations of carriers (49 U.S.C. 5, 312(b)). Transactions approved or authorized by the Commission are expressly exempted from the antitrust laws (49 U.S.C. 5(11), 5b).[11]

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[11] For other examples of pervasive regulatory schemes in situations in which the courts have held primary jurisdiction applicable, see *United States Navigation Co.* v. *Cunard Steamship Co., supra,* 284 U.S. at 480-486 (Shipping Act); *Pan American, supra,* 371 U.S. at 300-304 (Civil Aeronautics Act); *Carter* v. *American Telephone & Telegraph Co.,* 365 F. 2d 486, 494-495 (C.A. 5) (Communications Act-common carriers). Of course, the existence of pervasive regulatory schemes for certain purposes in industries covered by such acts does not mean that primary jurisdiction should be invoked in all antitrust cases involving those industries.

The contrasting lack of pervasive regulation in the Commodity Exchange Act is apparent. Neither the Secretary of Agriculture nor the Commodity Exchange Commission can limit entry of commodity brokerage firms into the commodities trading business, or has authority over expansions, mergers or withdrawals of firms from the business. The provision of particular services cannot be compelled. Moreover, new commodity exchanges may be organized and may withdraw from the business without regard to the economic consequences of these actions. Commission rates on exchanges are not subject to administrative approval and have never been regulated. Finally, there is no statutory immunity from the antitrust laws for actions of an exchange or its members.

Moreover, neither the Secretary nor the Commission is authorized to grant effective relief against conduct which violates antitrust policies, except to the extent of their specific regulatory authority to prevent manipulations and cornerings in the commodities trading business which may also constitute unreasonable restraints of trade.[12] The boycott alleged

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[12] Congress substantially amended the Commodity Exchange Act in 1968. See P.L. 90-258, 82 Stat. 26 *et seq.* The original version of the bill the Secretary of Agriculture proposed would have given him authority to issue a complaint if any person "has taken any action with the intent or having the effect of restraining trade in connection with the sale of any commodity, for future delivery or in interstate commerce, under contracts made on or subject to the rules of any board of trade * *." H.R. 11788, 89th Cong., 1st Sess., Section 20(a). Representatives of the commodity exchanges opposed this provision in congressional hearings. See, *e.g.*, Hearings

it this suit, however, is not related to price manipulation or cornering restraints.

Finally, the Commodity Exchange Act does not contain any express provision immunizing any activity from the operation of the antitrust laws. Although the court of appeals declined to determine whether the Secretary or the Commission had any power to grant antitrust immunity (App. 42, 45 n. 18), it suggested that the power to immunize might be implied from 7 U.S.C. 13c(b). That Section, however, merely states that neither the Secretary nor the Commission is required to report "minor violations" of the Act for prosecution when it would not be in the public interest to take such action. The provision makes no reference to the antitrust laws and obviously was not intended and should not be construed to limit the application of those laws to the commodities trading industry.

Thus, the Commodity Exchange Act does not provide pervasive regulation, broad or relevant powers to remedy antitrust violations or any power to immunize antitrust violations. Since none of these essential elements are present, the court of appeals erred in invoking the primary jurisdiction doctrine in this antitrust case.

Before the Subcommittee on Domestic Marketing and Consumer Relations *To Amend the Commodity Exchange Act*, House Committee on Agriculture, 89th Cong., 2d Sess., p. 52. The proposed provision was not adopted.

B. No Need for Agency Expertise has been Shown Here and Resolution of the Issues In this Case by the District Court Will Not Interfere With the Regulatory Scheme

As we have noted, primary jurisdiction is generally applied in cases involving regulatory agencies only if there is a need for agency expertise in resolving an issue central to a dispute, resolution of the issue by the courts will interfere significantly with the administration of the regulatory scheme, and an agency procedure exists for resolving the issue. The first two of these criteria are missing here; the existence of the third is in doubt.

1. There has been no showing of any need for administrative expertise to resolve the issues surrounding the alleged wrongful membership transfer. Whether petitioner had revoked the blank authorization to transfer his membership in the Exchange and whether the transfer took place improperly without notice or hearing and without consideration of petitioner's claim against Siegel (see p. 4, *supra*) are issues well within the competence of the district court to determine.

2. There is no indication that resolution of the issues by the district court will interfere with the regulatory scheme embodied in the Commodity Exchange Act. There are no provisions in the Act which specifically govern membership transfers and neither the Secretary nor the Commission has adopted rules on the subject. Moreover, it appears that no formal proceedings have ever been conducted before the Secre-

tary or the Commission on membership transfers.[13] Thus, at most, the policing of exchange membership practices is peripheral to the administration of the Commodity Exchange Act.

3. It is doubtful whether there is an administrative procedure for the determination of any issue in the antitrust proceeding. Under the Commodity Exchange Act, each commodity exchange designated as a contract market by the Secretary of Agriculture (see 7 U.S.C. 7) is obligated to enforce its rules or regulations which relate to "trading requirements." 7 U.S.C. 7a(8). If an exchange fails to comply with this or any other provision of the Act, the Secretary or the Commodity Exchange Commission may institute enforcement proceedings.[14] 7 U.S.C. 8, 9, 13a. The rules of the Chicago Mercantile Exchange allegedly violated here, however, relate to the transfer of memberships and may not be rules relating to "trading requirements" within the meaning of 7

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[13] The formal proceedings through June 30, 1971, are summarized in a Department of Agriculture publication entitled *Summary of Administrative and Judicial Proceedings Under the Commodity Exchange Act June 15, 1936-June 30, 1971, and Under the Grain Futures Act September 21, 1922-June 14, 1936.* None of the proceedings summarized therein appears to involve a membership transfer.

[14] Under 17 C.F.R. 0.53, any interested person may request that appropriate enforcement proceedings be instituted to remedy violations of the Act. Such a person would have no legal status in any proceedings which might be instituted, unless permitted to intervene.

U.S.C. 7a(8).[15] In that event, neither the Secretary nor the Commission would have any authority over their enforcement.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed insofar as it directs the district court "to stay the proceedings until such time as the Commodity Exchange Commission and/or the Secretary of Agriculture may act upon it" (App. 45).

Respectfully submitted.

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JUNE 1972.

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[15] 7 U.S.C. 7a(8) was added to the Act in 1968 together with a provision authorizing the Secretary to disapprove certain exchange rules (see 7 U.S.C. 12a(7)). In commenting on the additions, the Senate committee report states: "These provisions do not apply to bylaws, rules, regulations and resolutions, such as those covering the organization and government of the exchange, which are unrelated to contract terms and conditions, trading requirements and financial requirements." S. Rep. No. 947, 90th Cong., 2d Sess., p. 9.

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No. 71-858

Supreme Court, U. S.
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In the

Supreme Court of the United States

OCTOBER TERM, 1971

THOMAS RICCI,

Petitioner,

vs.

CHICAGO MERCANTILE EXCHANGE, an Illinois not-for-profit corporation, EVERETTE B. HARRIS, WILLIAM PHELAN, LEO MELAMED, THE SIEGEL TRADING COMPANY, a corporation, and JOSEPH E. SIEGEL,

Repondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR RESPONDENTS CHICAGO MERCANTILE EXCHANGE, EVERETTE B. HARRIS, WILLIAM PHELAN AND LEO MELAMED

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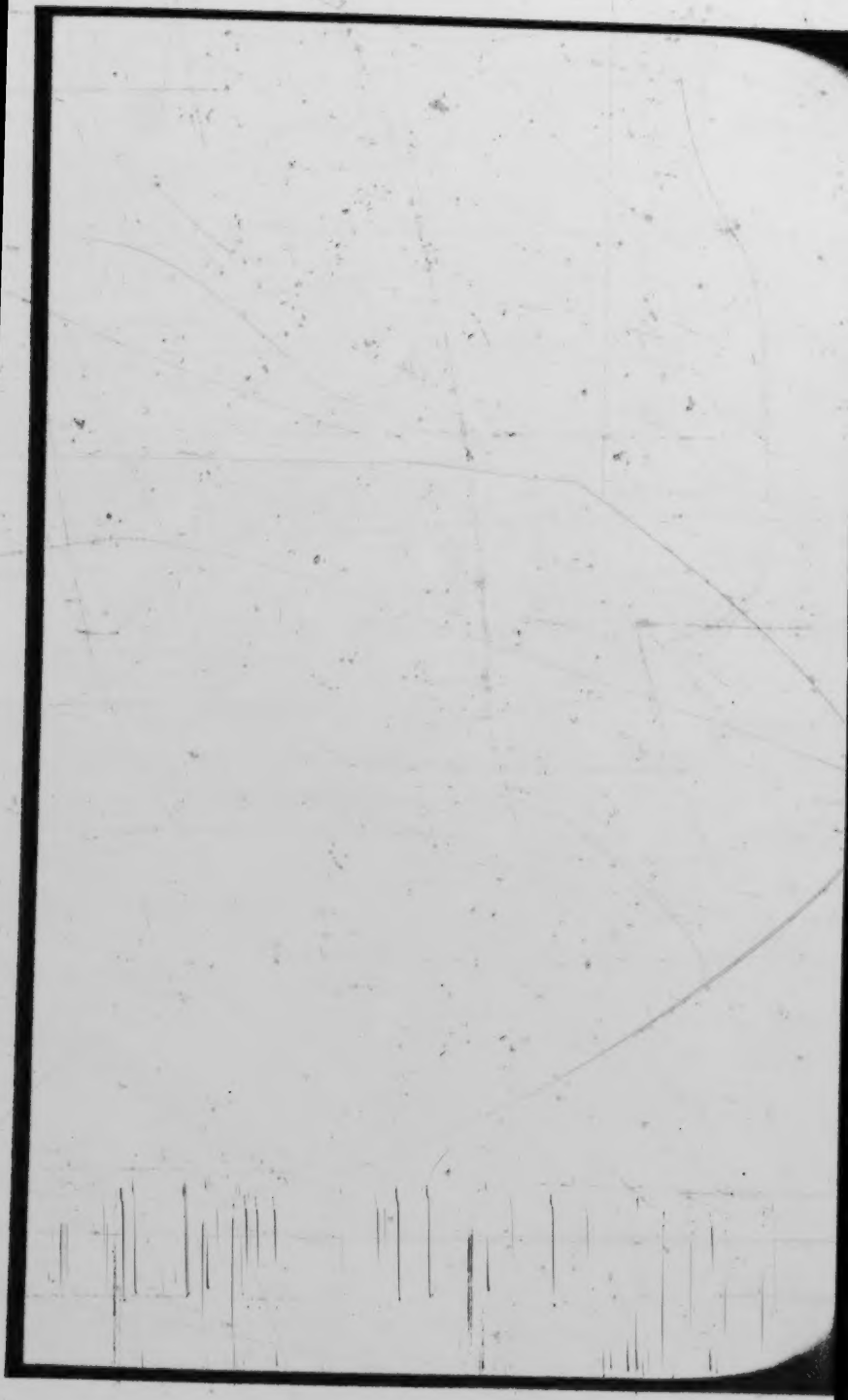

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-858

THOMAS RICCI,

Petitioner,

vs.

CHICAGO MERCANTILE EXCHANGE, an Illinois not-for-profit corporation, EVERETTE B. HARRIS, WILLIAM PHELAN, LEO MELAMED, THE SIEGEL TRADING COMPANY, a corporation, and JOSEPH E. SIEGEL,

Repondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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BRIEF FOR RESPONDENTS CHICAGO MERCANTILE EXCHANGE, EVERETTE B. HARRIS, WILLIAM PHELAN AND LEO MELAMED

COUNTER-STATEMENT OF FACTS

Petitioner has failed to set forth a complete statement of facts material to a consideration of the questions presented.

The Dispute Between Ricci And Siegel

This proceeding involves a dispute between petitioner Ricci and respondent Siegel over the ownership of a membership on the Chicago Mercantile Exchange ("CME"). The facts alleged in the complaint or admitted by Ricci at depositions may be briefly stated.[1]

Siegel hired Ricci as a part-time employee in 1967 and shortly thereafter in May 1967 purchased a CME membership which he registered in Ricci's name. (Ricci Dep. Tr. 5-8; Supp. App. 1-2)[2] On October 24, 1967, Ricci executed and delivered to Siegel an "Authorization to Transfer Membership," on a form prescribed by CME to fulfill the requirements of its Rule 307.[3]

Ricci concedes that the so-called Ricci membership was purchased for $15,000 with Siegel's funds, but claims that Siegel's payment was an advance to Ricci. No documents exist evidencing such a loan. In February 1969, two years after the purchase, a dispute arose between the parties. Ricci claimed ownership of the membership and sought to offset the $15,000 allegedly loaned for the purchase against approximately $18,000 claimed by Ricci against Siegel for floor brokerage fees. (Compl. ¶ 15; App. 11) Significantly, at the time Ricci urged this offset, the price of a CME membership had climbed to $45,000. (Compl. ¶ 18; App. 13)

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[1] Depositions of Ricci were taken prior to presentation of motions to the District Court to dismiss the complaint.

[2] "Supp. App." are references to the Supplemental Appendix attached to this brief.

[3] Rule 307 in pertinent part provided:

"Membership in the Exchange is a personal privilege subject to sale and transfer only as authorized herein. When a member or the legal representative of a deceased or incompetent member desires to sell a membership, he shall sign an authorization to transfer in such form as shall be prescribed by the Board."

On February 11, 1969, Siegel claimed to be the owner of the Ricci membership by reason of the CME "Authorization to Transfer Membership" that had been executed by Ricci. Contemporaneously, Ricci wrote CME directing the revocation of that authorization to transfer. (Compl. ¶¶ 15, 19; App. 11, 13) The President of CME, respondent Harris, replied that "the rules of the Exchange would be observed." (Ricci Dep. Ex. 10; Supp. App. 3)

On February 17, 1969, Ricci and Siegel were invited to and did appear before CME's Board of Governors to air their dispute. (Ricci Dep. Tr. 45; Supp. App. 2) After discussion, the Board of Governors suggested arbitration under CME rules and both parties agreed. But on February 24, 1969, Ricci repudiated his agreement to arbitrate. (Ricci Dep. Tr. 47, 71-73; Ricci Dep. Exs. 2, 3, 6, 7, 8; App. 27-31; Supp. App. 2)[4]

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[4] Ricci's attorney on February 27, 1969, wrote to the Secretary of CME in part as follows:

> "In accordance with rule 500 Mr. Thomas Ricci has been directed by Everette B. Harris to submit the matter of the ownership of his membership to arbitration. It is my interpretation that this matter is not within the scope defined as being arbitrative. To coerce Mr. Ricci to submit is a direct denegation of several of our rules." (Ricci Dep. Ex. 2; App. 30)

Nevertheless, Ricci, in support of his charge that CME had denied him a hearing, has disingenuously contended that CME ignored and circumvented its arbitration rule, stating on page 26 of his brief in the Court of Appeals:

> "The Rules of the Chicago Mercantile Exchange (Rule 5) provide for arbitration of disputes between members, a procedure which, if followed, would have given appellant an opportunity for the full airing of his dispute with Siegel. However, in this case, the Exchange ignored its own rules and circumvented the arbitration requirement by means of a conspiracy between the Exchange officers and Siegel, as charged in the Complaint."

Subsequently, Siegel presented CME with Ricci's "Authorization to Transfer Membership" with the request that the membership be transferred, but CME withheld action until it simultaneously approved the transfer of another membership to Ricci. As petitioner testified:

> "Q. . . . Was there a single day when you were not a member of the Exchange during the period from January, 1969 to April, 1969?
> A. No." (Ricci Dep. Tr. 80; App. 27)

Ricci thereupon filed a treble damage antitrust complaint[5] charging that CME and its officers and Siegel "wilfully, unlawfully, knowingly and maliciously" conspired to prevent Ricci from "continuing as a member of the Chicago Mercantile Exchange" (Compl. ¶ 14; App. 11), "to violate the rules and regulations of the Chicago Mercantile Exchange" (Compl. ¶ 16; App. 12), to cause the transfer of the membership "without a notice or hearing" and thus to deprive him of "his right to act as a member of the Chicago Mercantile Exchange * * * from on or about February 11, 1969, to March 4, 1969." (Compl. ¶ 18; App. 13)

Proceedings Below

Motions to dismiss the complaint for failure to state a cause of action were filed in the District Court. Before the motions were considered, preliminary discovery was pursued, including depositions of Ricci and respondent Melamed, Chairman of the Board of CME. References to these depositions were made in the briefs filed by both parties in support of and in opposition to the motions. CME quoted the admissions in Ricci's depositions that he had received notice and an opportunity to be

[5] The complaint also alleged tortious interference with commercial relationships.

heard on his membership dispute; that arbitration had been suggested, first agreed upon and then rejected by Ricci; and that Ricci was a member of CME at all times.

Ricci had requested the opportunity to take additional depositions of defendants prior to filing his answering brief, but this request was denied, though the District Court was made aware that references to the depositions were being used without objection in presenting the motion to dismiss. (Proceedings of September 29, 1969, Tr. 12-13; Supp. App. 4)

Having concluded to dismiss the complaint, the District Court first requested the submission of findings of fact and conclusions of law (which was done), but then disposed of the matter by an oral opinion. (App. 22)

Before the Court of Appeals, respondents urged that the dismissal motions had been treated as Rule 56 motions for summary judgment since matters outside the pleadings had been submitted without objection and considered by the District Court. The Court of Appeals, however, rejected this contention, holding instead that the District Court only considered the pleadings in ruling on the motions and that the complaint sufficiently alleged a group boycott, a *per se* violation of Section 1 of the Sherman Act.[6] The Court of Appeals then held:

> "[T]hat before a private treble damage action for antitrust violations may be brought against these defendants charging violation of the rules promulgated as a condition to a contract market designation, the

[6] This Court may want to affirm the District Court's ruling as correct even though the basis of the rule was considered incorrect by the Court of Appeals. See *Securities and Exchange Comm'n* v. *Chenery Corp.*, 318 U.S. 80, 88 (1943). Respondents have not cross-appealed or petitioned this Court for review of the Seventh Circuit's decision.

Commodity Exchange Commission and/or the Secretary of Agriculture must have the first opportunity to secure the fulfillment of the statutory duties imposed upon exchanges and their members. The correct remedy in such a case where there is the possibility of a judicial remedy that cannot be granted by the administrative agency is to remand the case to the district court with directions to stay the proceedings until the agency has acted." (App. 45)

SUMMARY OF ARGUMENT

The Commodity Exchange Act provides a comprehensive system of regulation of commodity futures trading on contract markets. Self-regulation by contract markets under the supervision of the Secretary of Agriculture and Commodity Exchange Commission, subject to judicial review, has been established as Congressional policy to achieve the objectives of the Act. Congress has authorized restraints on competition imposed by the agencies and the contract markets to further the legitimate purposes of the regulatory scheme.

Primary jurisdiction is a flexible concept which involves degrees of judicial deference and prior resort to administrative agencies depending upon the regulatory system and the need to promote the proper accommodation between the courts and the agencies.

Prior resort to the Commodity Exchange Commission in this case is appropriate to secure agency consideration of alleged violations of the Commodity Exchange Act and agency implementation of that Act. Upon consideration of the contested matters, the agency may find that a violation occurred for which sanctions under the Commodity Exchange Act should be imposed; that the violation was minor and the public interest does not require the application of sanctions; that no violation occurred;

or that the action of the contract market was taken in good faith to effectuate an imposed statutory duty of self-regulation. In the latter case, justification would exist for the action taken which would excuse the contract market and its officers from an antitrust claim under the rule of reason. Unrestricted antitrust attacks against contract markets without prior resort to the agency would imperil self-regulation.

The criteria expressed in *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963), when applied to the Commodity Exchange Act, decisively support the application of the primary jurisdiction doctrine. That Act was expressly amended in 1968, following *Silver*, to grant the Secretary of Agriculture authority to disapprove contract market rules related to the terms and conditions of contracts, trading requirements and minimum financial requirements, and to grant the Commodity Exchange Commission authority to review the enforcement of such rules and, where non-enforcement is found, to impose sanctions, subject to judicial review.

The matters here in controversy involve a garden variety dispute over the rights to a membership. The rule of the Chicago Mercantile Exchange claimed to be violated is a rule relating to trading requirements—since the statute makes it unlawful to trade commodity futures except as a member of a contract market. Accordingly, the enforcement of that rule is directly subject to agency control.

The Court of Appeals properly reconciled antitrust aims with the public policy to be furthered by the Commodity Exchange Act—by submitting the controversy initially to the regulatory agency involved, but retaining jurisdiction in the District Court to consider remaining antitrust aspects and possible remedies which the agency cannot grant.

ARGUMENT

I.

THE COMMODITY EXCHANGE ACT PROVIDES COMPREHENSIVE REGULATION OF COMMODITY FUTURES TRADING AND THE PARTICULAR MATTERS BEING CONTESTED.

A. THE REGULATORY SYSTEM WAS FOUND IMPERATIVE TO PROTECT THE NATIONAL PUBLIC INTEREST.

Congress, in enacting the Commodity Exchange Act ("CEA"),[1] declared that transactions of argricultural commodity futures "are affected with a national public interest" making "regulation imperative" since futures prices are "quoted and disseminated throughout the United States and in foreign countries as a basis for determining the price to the producer and consumer" and that futures transactions are "susceptible to speculation, manipulation, and control [frequently resulting in] sudden and unreasonable fluctuations in the prices thereof * * * which are detrimental to the producer or the consumer and the persons handling commodities." (7 U.S.C. 5)

Congress considered it in the national public interest to provide a free and competitive futures trading market, so that reported futures prices forming the basis for worldwide trade in agricultural commodities and resulting from

[1] Originally enacted as Grain Futures Act in 1922 (42 Stat. 998) and subject to major amendments on June 15, 1936 (49 Stat. 1491) and February 19, 1968 (82 Stat. 30). 7 U.S.C. 1 *et seq.*

bids and offers in established trading pits would competitively reflect the daily appraisal of supply and demand factors by regulated, responsible and informed traders, producers, handlers and consumers.

This Court stressed in *Rice* v. *Board of Trade*, 331 U.S. 247, 250 (1947) (Douglas, J.), that "the Commodity Exchange Act provides comprehensive regulation of trading in futures on commodity exchanges which are designated as 'contract markets' by the Secretary of Agriculture."

B. STATUTORY CONDITIONS AND REQUIREMENTS MUST BE MET FOR AN EXCHANGE TO BE DESIGNATED AS A CONTRACT MARKET.

CME is an Illinois not-for-profit corporation which provides an exchange hall for its members to conduct commodity futures trading by reason of its designation by the Secretary of Agriculture ("Secretary") as a contract market. Only upon the Secretary's designation of the exchange as a contract market and his approval of the particular agricultural commodities sought to be futures traded may such trading legally occur. To be so designated an exchange must comply with specified statutory conditions and requirements, including:

1. Be located at a terminal market where the cash commodity is sold in sufficient volume to reflect general values and where official commodity inspection services are available.
2. Require futures deliveries to be made with commodities conforming to promulgated United States standards from warehouses required to make reports and keep records and subject to government inspection.
3. Enact and enforce rules of government providing that its *members* among other things: a) not disseminate false crop reports or market infor-

mation; b) not manipulate prices or corner any commodity; c) keep records, file reports as directed by the Secretary and be open to government inspection (7 U.S.C. 7(b)); d) comply with provisions of CEA and the Secretary's regulations and orders (7 U.S.C. 7); e) meet minimum financial standards (7 U.S.C. 6f, 7a(9)).

C. THE COMMODITY EXCHANGE ACT REGULATES WHO CAN ENGAGE IN THE FUTURES TRADING BUSINESS AND THUS RESTRICTS ENTRY.

Congress authorized the Secretary to control the persons who may engage in futures trading for others by providing for registration of futures commission merchants and futures floor brokers who must:

1. File applications with the Secretary.
2. Keep books and records open to government inspection and furnish prescribed reports.
3. Meet minimum financial requirements (in this instance established by CME).
4. Segregate customer funds.
(7 U.S.C. 6d, 6e, 6f, 6g, 12a(1)(2)(3))

It is unlawful for a person to solicit, accept or execute a futures contract on a contract market unless so registered. Petitioner Ricci was required to and did register as a futures commission market. In addition he had to be a member of CME before he could engage in the commodity futures business on that exchange.

D. GENERAL REGULATORY POWERS OF THE SECRETARY OF AGRICULTURE.

To accomplish the objectives and purposes of the CEA, the Secretary has been given broad regulatory powers with the right, upon hearings and subject to judicial

review, to impose sanctions on all persons (other than contract markets). He is authorized to:

1. Promulgate regulations "reasonably necessary to effectuate any of the provisions or *accomplish any of the purposes* of this Act." (7 U.S.C. 12a(5); emphasis supplied) Pursuant to this authority, extensive regulations have been promulgated.[8]
2. Conduct investigations. (7 U.S.C. 12, 12-1)
3. Require the maintenance of records and the filing of reports.
4. Disapprove any rule of a contract market which relates "to terms and conditions in contracts" or "other trading requirements" when found to be in violation of CEA or regulations of the Secretary or Commodity Exchange Commision[9] (7 U.S.C. 12a(7)), and to approve rules dealing with minimum financial requirements of exchange members. (7 U.S.C. 6f)
5. Institute hearings upon notice, if he has reason to believe a person (other than a contract market) is manipulating futures prices, has issued false statements or has otherwise violated the CEA or the regulations of the Secretary or Commission. If violations are found, suspension and revocation of trading privileges may be ordered subject to judicial review by a circuit court of appeals. (7 U.S.C. 9, 15)

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[8] 13 F.R. 7834, 14 F.R. 2581, 15 F.R. 4443, 18 F.R. 176, 19 F.R. 6880, 20 F.R. 5288, 6385, 7774, 8043, 21 F.R. 6913, 22 F.R. 6967, 8899, 23 F.R. 6879, 24 F.R. 1288, 26 F.R. 126, 1662, 4887, 27 F.R. 12672, 28 F.R. 5419, 6266, 7471, 30 F.R. 1191, 2258, 6941, 15210, 31 F.R. 4590, 5054, 32 F.R. 7593, 33 F.R. 6088, 8268, 14454, 17900, 34 F.R. 599, 812, 6478, 17511.

[9] The Commodity Exchange Commission ("Commission") consists of the Secretary of Agriculture, Secretary of Commerce and the Attorney General, or their representatives. (7 U.S.C. 2, 4)

6. Issue cease and desist orders, the failure to comply therewith constituting a misdemeanor or felony, punishable by fine and imprisonment. (7 U.S.C. 13, 13b)
7. Report violations of CEA to the Department of Justice for criminal prosecution. Neither the Secretary nor the Commission are required however, "to report minor violations of this Act for prosecution, whenever it appears that the public interest does not require such action." (7 U.S.C. 13c(b))

E. MANDATED SELF-REGULATION BY CONTRACT MARKETS SUBJECT TO COMMISSION CONTROL AND JUDICIAL REVIEW OF THE MATTERS CONTESTED SATISFIES PRIMARY JURISDICTION REQUIREMENTS.

The crux of the commodity futures regulatory system is the Congressional policy that imposes on designated contract markets broad self-regulation responsibilities subject to agency control and judicial review. In order to qualify as a contract market an exchange must adopt and file with the Secretary, subject to his disapproval, statutorily required rules of trading and government. The CEA then requires the contract market to:

> "[E]nforce all • • • rules • • • which relate to terms and conditions in contracts of sale • • • or relate to other trading requirements and which have not been disapproved by the Secretary • • • [and] which provide minimum financial standards and related reporting requirements for futures commission merchants who are members of such contract market and which [rules] have been approved by the Secretary." (7 U.S.C. 7a (8)(9))

Failure of a contract market to enforce such "rules of government" made a condition of its designation, or failure

to comply with any provision of CEA or regulations of the Secretary or Commission, upon hearing by the Commission and subject to judicial review may result in (i) suspension or revocation of its designation as a contract market, or (ii) a cease and desist order, the violation of which may subject the contract market, its officers and agents, to fine and imprisonment. (7 U.S.C. 7b, 13a)

Rules of practice under the CEA have been adopted setting forth the procedures followed by the Secretary in disciplinary proceedings involving any person other than a contract market, and by the Commission governing disciplinary proceedings involving contract markets. (17 C.F.R. §§ 0.0-0.72) These regulations authorize the institution of proceedings before the Commission either on the Commission's own motion or on application of any interested party having information of any CEA violation by a contract market. Hearings are conducted before an appointed referee. Participation in the hearings and proceedings is permitted upon petition for intervention showing good cause. The referee, after the hearings are concluded, is required to file a report with the Commission which forms the basis of argument before, and decision by, the Commission.

In this case, petitioner claims CME violated exchange rules dealing with his right to membership. Since Congress has declared it to be unlawful to trade in specified commodity futures except "where such contract is made by or through a member of a board of trade which has been designated by the Secretary of Agriculture as a 'contract market,'" the rights of membership necessarily involve rules relating to "trading requirements." (Opinion of the Court of Appeals, App. 41) Such rules may be disapproved by the Secretary when filed. These rules must be en-

forced by the contract market when not disapproved, and such enforcement is subject to Commission control.[10]

Mandated self-regulation is the necessary core of the system because of the multitudinous daily transactions involved, the existence of long standing trade customs and the complexities of agricultural marketing. Proper regulation requires comprehensive, yet flexible trading rules, and day-by-day close supervision by exchange officers and committees with market expertise enabling them to make prompt decisions to assure a free and competitive market. In the CEA, as in the Securities Exchange Act, "'the exchanges take the leadership with the Government playing a residual role.'" *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 352 (1963).

Self-regulation is effected in large part by placing the statutory responsibility on contract markets to require their *"members"* to keep records, file reports, meet minimum financial requirements, and comply with the rules of government of the contract market, the statutory provisions and regulations promulgated by the Secretary and the Commission, and to prevent such members from issuing false reports or attempting to manipulate prices or corner the market.

In order to fulfill CME's statutory duties, a detailed and comprehensive set of rules covering its government, trading, membership and other provisions was adopted by

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[10] The Court of Appeals correctly held that "the specific allegations [in the complaint] relate directly to the Commission's and the Secretary's power to designate contract markets and allow the trading in futures by individuals." (App. 43) The United States erroneously expressed doubt as to whether the rules dealing with membership related to "trading requirements" over which the Commission possessed enforcement authority. (U.S. Br. 27-28)

CME and filed with the Secretary. Certain rules were modified or withdrawn to meet objections raised by the Secretary after review. As modified the rules were accepted, and thus became effective rules which had to be enforced by CME. These CME rules include a chapter on "Enforcement of Rules" against members. This chapter provides for notice and hearings before the president of CME and several specially established committees, depending upon the type of offense involved, and authorizes the imposition of sanctions, such as fines, suspension or revocation of trading and membership privileges. Appeal from such determinations may be taken to CME's Board of Governors.[11] The broad purposes of the rules are expressed in Rule 400 as follows:

> "The Board has adopted rules, and from time to time adopts amendments and supplements to such rules, to assure a free and open market on the Exchange, to insure the integrity of contracts on the Exchange, to maintain proper and dignified trading conduct and to provide the maximum protection to the public in its contacts with the Exchange and its members. To that end, the Board has appointed officers and created committees to which it has delegated responsibility for the investigation, hearing and imposition of penalties for violations of the rules of the Exchange." (Supp. App. 5)

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[11] The latest edition of the chapter of CME rules dealing with enforcement is reproduced in the Supplemental Appendix, pages 5-19. Similar enforcement procedures were in effect at the time of the Ricci dispute, including investigations, notice and hearings before the president of CME and hearings and appeals to the Board of Governors.

II.

UNRESTRICTED ANTITRUST ATTACKS AGAINST CONTRACT MARKETS WITHOUT PRIOR RESORT TO THE AGENCY WOULD IMPERIL THE CONGRESSIONAL POLICY OF SELF-REGULATION.

Despite the heavy responsibility of Congressionally imposed self-regulation upon contract markets, every action or decision of the contract market is susceptible to attack as being a concerted action to restrain trade or a group boycott. Such attacks cannot be permitted if the regulatory system is to work. Mr. Justice Stewart, dissenting in *Silver,* pointed to this danger facing a self-regulation system:

> "It may be assumed, I think, that almost every exercise of an exchange's statutory duty of self-regulation would involve an actual or threatened concerted refusal to deal — a 'group boycott.'" (373 U.S. at 367, fn. 1)

The dilemma facing CME in fulfilling its duties of self-regulation is highlighted in two cases now pending in the Seventh Circuit on review of denials of motions for prior resort to the Commission.

In *Phillips* v. *Chicago Mercantile Exchange* (Docket No. 71-1892), a complaint was filed against CME and some of its officers charging a violation of the antitrust laws and the CEA, arising out of an order by CME that certain clearing members liquidate fifty percent of their open interests to insure a free and competitive market. CME issued this order following a determination that the liquidity of March 1970 fresh egg futures contracts was threatened.

In *Deaktor* v. *Chicago Mercantile Exchange* (Docket No. 71-1893), after trading in July 1970 frozen pork belly futures had closed, CME instituted disciplinary proceed-

ings against several members charging them with having violated various rules of the exchange and with having manipulated July 1970 frozen pork belly futures prices. Hearings were conducted for six weeks before the full twelve-man CME Board of Governors, and severe penalties were imposed including revocation of clearing house membership, suspensions from trading for up to three years and substantial fines.[12] Nevertheless, suit was filed by shorts in the market charging that CME had failed to enforce its rules by not acting promptly to prevent manipulations.

Thus, CME is condemned in *Phillips* for taking action during the contract month and in *Deaktor* for not taking action until the contract trading ended. These cases now pending against CME demonstrate the potential danger to contract markets from unrestricted court attacks, if it does, or does not, take action in fulfillment of its self-regulation duties.

Judge Nordbye early recognized the need for primary resort to the agency in view of the operational dilemma facing self-regulating exchanges. *Minneapolis Grain Exchange* v. *Farmers Union Grain Terminal Ass'n*, 75 F. Supp. 577 (D. Minn. 1947). In considering the rule-making powers conferred upon exchanges with respect to membership of cooperatives, the court said:

> "On the one hand, if plaintiff [Minneapolis Grain Exchange] fails to enforce a valid rule, it may be subjected to the penalties provided therefor in the Act. On the other hand, if it enforces an invalid rule,

[12] *The Wall Street Journal* of October 22, 1970, reported: "The governors of the Chicago Mercantile Exchange meted out heavy penalties to four individual members and three member firms for rule violations in trading July 1970 pork belly futures."

it likewise may incur the penalties covering such conduct." (75 F. Supp. at 581)

* * *

"The dilemma which apparently confronts the plaintiff with regard to the applicability of the rules in question to cooperatives must ultimately be determined by the Commission and not by this Court. Suitable machinery is provided in the Act for that very purpose. * * * The intervention of this Court in assuming jurisdiction may give rise to an unfortunate conflict between the rulings of this Court on factual questions and those made by an administrative agency which is expressly clothed by Congress with jurisdiction to determine such a controversy." (75 F. Supp. at 582)

If petitioner's position were accepted and the regulatory system could be avoided by filing a purported antitrust complaint, then every action of a contract market could be subject to judicial attack and the self-regulatory system seriously impeded, if not disrupted. The thrust of the complaint goes to the heart of the regulatory system—the maintenance of a responsible membership organization to achieve compliance with statutorily prescribed and agency approved rules. If the federal court acts here without prior resort to the agency, precedent would be created for repeated imposition of complex and costly antitrust proceedings against contract markets in every situation where action is taken or a decision made by contract markets, even though *bona fide* and within the sphere of their mandated duties.

A delicate balance must be struck to create a climate in which contract markets will be encouraged to bear the burdens and responsibilities of self-regulation, unstifled by the constant threat of harassing antitrust suits, and yet with ultimate responsibility to answer for their derelictions. This balance can be best evolved by the

agency having the express regulatory authority to assure that the designated contract markets are properly enforcing their rules. Only through prior resort to the Secretary and Commission for a consideration of the regulatory issues involved in such attacks can a proper balance be attained, uniform standards evolved and self-regulation made to work. This procedure may result in justification being found for CME's action which, under the rule of reason, would immunize the contract market from antitrust claims. The Court of Appeals quite properly recognized this need to encourage self-regulation by contract markets and strengthen the watch-dog functions of the Secretary and Commission by invoking the doctrine of primary jurisdiction. (App. 43, 44)[13]

III.

A COMMON SENSE READING OF THE COMPLAINT MAKES IT OBVIOUS THAT THESE ISSUES SHOULD BE FIRST SUBMITTED TO THE COMMISSION.

A practical view of the pleadings alone (without considering petitioner's admissions in deposition) establishes that the instant proceeding involves a garden variety dispute over the ownership of a CME membership. No doubt the circumstances regarding the acquisition and ownership of the membership were confused. But this was

[13] Petitioner argues that the alleged group boycott is a *per se* violation which cannot be arguably lawful and therefore resort to the Commission would be a futile procedure. (Pet. Br. 19-23) On this basis, every decision or action of CME in fulfillment of its statutory duties of self-regulation would similarly be a group boycott or other antitrust violation, incapable of justification. Such a position would emasculate the Congressional policy of self-regulation embodied in the CEA.

the very reason CME had to act. The executed authorization to transfer membership by Ricci must have had some meaning. The attempt by Ricci to unilaterally revoke that authorization indicated he had notice of pending CME action on his executed authorization. His belated attempt to set-off an amount allegedly owed him in satisfaction of the original price paid for the membership must be viewed in the light of the threefold increase in the value of the membership from $15,000 to $45,000. In these circumstances, CME was required to decide the matter of trading rights and therefore the issue of ownership.[14]

Under the CEA the issues referred to the Commission for determination in this case would include:

1. What rule, if any, was allegedly violated?
2. Was such a rule properly adopted, filed with the Secretary and not disapproved?
3. What is the trade custom and practice with respect to blank authorizations to transfer memberships and unilateral revocation of such authorizations?
4. What was the purpose of executing the authorization?
5. To what extent, if any, was petitioner denied membership in CME or denied trading privileges?

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[14] It is not claimed that the decision was merely erroneous, but that CME "wilfully, unlawfully, knowingly and maliciously confederated, combined and conspired * * * with Siegel * * * to prevent * * * Ricci from continuing as a member" of CME. (Compl. ¶ 14; App. 11) On the face of the complaint, these antitrust allegations appear frivolous. This may have been the reason for the District Court's dismissal and for the decision of the Court of Appeals to first refer the matter to the Commission to determine whether procedures followed by CME were appropriate to its self-regulation duties and therefore justified under the antitrust laws.

6. Were CME's arbitration procedures, as contained in its filed rules, made available?
7. What action is permissive to CME in resolving membership disputes?

Where there is a dispute as to ownership of or the exercise of the privileges of membership, CME must take action to resolve that dispute. When CME does fulfill this responsibility, and resolves a membership dispute, there is likely to be a losing party. The latter may complain before the Commission that CME failed to enforce its rules or acted contrary to the provisions of the CEA. The issues would be flexibly and expertly resolved by the Commission. The action by CME subject to Commission and then judicial review (7 U.S.C. 8(a)) may be found by the Commission to be justified as in furtherance of the self-regulatory aims of CEA. Thereafter, the District Court may deem CME's action to be within the rule of reason when ruling upon the antitrust claim. *Board of Trade* v. *United States*, 246 U.S. 231 (1918).

The United States in its *amicus* brief (pp. 26-27) points out that no formal proceedings are recorded as having been conducted before the Secretary or the Commission involving membership transfers. Does this not reflect the efficiency of the contract markets in this area of self-regulation? Membership disputes rarely occur and, when they do, are resolved by prescribed arbitration or decision of contract markets, based upon long-standing and accepted trade practices and customs. When so decided, they have not been further questioned.

IV.

THE COURT OF APPEALS PROPERLY GAVE RECOGNITION TO ACHIEVING THE OBJECTIVES OF THE COMMODITY EXCHANGE ACT WHILE RETAINING JUDICIAL AUTHORITY TO DEAL WITH REMAINING ANTITRUST ISSUES.

Petitioner and the United States as *amicus* have mistakenly conceived of the primary jurisdiction concept applied by the Court of Appeals as having "stripped the district court of the power to determine antitrust issues in private actions" (Pet. Br. 10), as creating an "exemption from the antitrust laws" (Pet. Br. 7), and as having found the regulatory system "so pervasive as to exclude or supersede the antitrust powers of the district court." (Pet. Br. 12; U.S. Br. 14)

On the contrary, the Court of Appeals, in view of the charged violation of exchange rules, ordered prior reference to the Commission (the agency with immediate authority to deal with such violations), while retaining jurisdiction in the District Court to consider and determine remaining antitrust issues (including possible justification of the action taken), and to grant appropriate relief. The Court of Appeals specifically held that "the correct remedy in such a case *where there is the possibility of a judicial remedy that cannot be granted by the administrative agency,* is to remand the case to the district court with directions to stay the proceedings until the agency has acted." (App. 45; emphasis supplied)

On the facts alleged, the Commission would determine whether CME's action was (a) contrary to its rules or the regulations of the Secretary or Commission, (b) made in good faith pursuant to the mandated duty of self-regulation, or (c) justifiably necessary to make the self-regulatory

system work. In that connection, the Commission could take into account antitrust principles. (App. 42) It would also have to decide whether a violation of CEA, if found, required imposition of CEA sanctions or was a minor violation which in the public interest should not carry sanctions.

With these agency findings in hand, the antitrust court could then proceed in a more informed manner to determine whether a restraint of trade occurred and, if so, in view of the justification possibly found by the Commission, whether such restraint was permissive under the rule of reason. This application of the primary jurisdiction concept is well within established judicial criteria.

A. PRIMARY JURISDICTION IS A FLEXIBLE CONCEPT.

"Whenever a regulated industry comes under antitrust surveillance, a danger arises that judicial and administrative perceptions of the public interest will conflict." *Note*, 85 *Harv. L. Rev.* 794, 818 (1972). This Court has evolved principles of accommodation with administrative agencies under the concept of primary jurisdiction. But that concept cannot be expressed as a fixed formula since it encompasses varying degrees of judicial deference depending upon the scope, purposes and objectives of the regulatory system. At least five degrees of judicial application of the primary jurisdiction doctrine have been enumerated by commentators, ranging from complete exemption from judicial antitrust control ("exclusive" jurisdiction in the agency) to varying degrees of prior resort to and judicial consideration of agency determinations. *Note*, 85 *Harv. L. Rev.* 794, 821-822 (1972); Jaffe, *Primary Jurisdiction*, 77 *Harv. L. Rev.* 1037, 1038-1039 (1964).

In *Civil Aeronautics Board* v. *Modern Air Transport, Inc.*, 179 F.2d 622, 625 (2d Cir. 1950), Judge Clark stated that "the outstanding feature of the doctrine [primary jurisdiction] is properly said to be its flexibility permitting the courts to make a workable allocation of business between themselves and the agencies."

This Court in *United States* v. *Western Pacific Ry. Co.*, 352 U.S. 59 (1956), speaking through Mr. Justice Harlan, acknowledged this flexibility:

> "The doctrine of primary jurisdiction, like the rule requiring exhaustion of administrative remedies, is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties." (352 U.S. at 63)
>
> "No fixed formula exists for applying the doctrine of primary jurisdiction. In every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation." (352 U.S. at 64)

Those reasons include:

> "Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure." (352 U.S. at 64-65)

B. THE CEA AUTHORIZES RESTRAINTS ON COMPETITION TO FURTHER THE LEGITIMATE PURPOSES OF THE REGULATORY SCHEME AND ITS SELF-REGULATIVE POLICY.

Congress has expressly authorized the agencies themselves, or through self-regulation by contract markets under agency supervision, to place restrictions on competition in furtherance of the regulatory objectives and purposes of the CEA. Such restrictions include:

1. Restrictions on membership and trading privileges imposed by the Secretary (7 U.S.C. 6d, 6e, 6f, 6g, 12a(1)(2)(3)) and contract markets. (CME Rules, Chapter 3—Memberships)

2. Limits on the time, place and date of trading imposed by the Secretary (7 U.S.C. 7a(4)(5)) and contract markets. (CME Rule 705—pit and board trading; Rule 1602—trading months and hours, trading units, price increments for Frozen Pork Bellies. Other commodity contracts have similar provisions.)

3. Statutory prohibitions against specified unfair methods of competition and predatory practices. (7 U.S.C. 6b, 6c)

4. Limits on volume of trading and accumulation of positions by individuals and groups imposed by the Commission (7 U.S.C. 6a) and enforced by contract markets. (*Eg.*, CME Rule 1202 E, F, G—Boneless Beef; Rule 1402 E, F, G—Fresh Eggs; Rule 1602 E, F, G—Frozen Pork Bellies; Rule 1702 E, F, G—Live Cattle)

5. Limits on daily price fluctuations imposed by contract markets. (*E.g.*, CME Rule 1602 D—daily price limits for Frozen Pork Bellies)

Additionally, the CEA has expressly granted antitrust functions to the agencies and provided for the application of antitrust principles. For example:

1. The prevention of monopolization of the market is achieved by authorizing the fixing of maximum limits on the volume of trading and the accumulation of futures positions. (7 U.S.C. 6b) Corners are prevented by rules adopted by contract markets and the imposition of criminal penalties. (7 U.S.C. 7(d), 13(b))

2. Price-fixing is prohibited by rules of contract markets and sanctions imposed by the Secretary which seek to prevent manipulations of prices and sudden and unreasonable price fluctuations. (7 U.S.C. 7(b), 9, 13, 13b, 15)

Congress has thus explicitly authorized these restraints on trade and competition. To the extent that these restraints are imposed as a matter of self-regulation by a contract market rule subject to agency review, it is clear that the agencies "deal with at least some antitrust problems." *Pan American Airways, Inc.* v. *United States,* 371 U.S. 296, 304 (1963).

The United States in its *amicus* brief (p. 23) erroneously seeks to distinguish the Shipping Act, Interstate Commerce Act and Civil Aeronautics Act from the scheme of self-regulation embodied in the CEA by contending that the former three statutes "all evidence a congressional intent either to limit or restrict competition in particular circumstances under agency supervision * * *." We submit that such a Congressional intent is also evidenced in the CEA.

Reasonable restraints by such self-regulating exchanges have been sustained. Thus, in *Board of Trade* v. *United States,* 246 U.S. 231 (1918), this Court justified an exchange rule which prohibited the purchase or sale of cash

grain during the period, from the call (the close of trading) to the opening the next business day, at a price other than the closing bid at the call. Justice Brandeis held:

> "The case was rested upon the bald proposition that a rule or agreement by which men occupying positions of strength in any branch of trade fixed prices at which they would buy or sell during an important part of the business day is an illegal restraint of trade under the Anti-trust Law. But the legality of an agreement or regulation cannot be determined by so simple a test as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition, or whether it is such as may suppress or even destroy competition." (246 U.S. at 238)

Under the circumstances, the exercise of judicial deference through prior submission of the claimed violation of the CEA to the agencies responsible for administration of that regulatory system properly accommodates the respective functions of the agencies and the court.

C. THE CRITERIA ANNOUNCED IN SILVER HAVE BEEN PROPERLY APPLIED.

1. The question of primary jurisdiction under the CEA. The application of the primary jurisdiction concept to a marketing system based upon an expressed Congressional policy of self-regulation, subject to agency and judicial review, involves different criteria than those applied in dealing with regulatory systems such as public utility acts. Chief Judge Swygert, in considering the application of issues of primary jurisdiction to the Securities Exchange Act, found that decisions in other regula-

tory fields "do not provide clear guidance for resolution of this question." *Thill Securities Corporation* v. *New York Stock Exchange,* 433 F.2d 264, 277 (7th Cir. 1970). The Court of Appeals adopted a similar view in this case. (App. 44, fn. 15).

The CEA and the Securities Exchange Act are comparable statutes. The Securities Exchange Act was passed twelve years after the CEA and incorporated many of CEA's features, including the policy of self-regulation by exchanges. In consequence, this Court's standards for application of the primary jurisdiction concept under the Securities Exchange Act are controlling in the CEA field.[15]

While the question of primary jurisdiction was not reached in *Silver* v. *New York Stock Exchange,* 373 U.S. 341 (1963), the criteria announced in that decision properly govern the primary jurisdiction issue raised here. The Court in *Silver* found that the Securities Exchange Act "does not give the Commission jurisdiction to review particular instances of enforcement of exchange rules," and in consequence "obviates any need to consider whether

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[15] Only recently, Senator Jordan (D. South Carolina), Chairman of the Senate Subcommittee on Agricultural Production, Marketing and Stabilization of Prices, stated:

> "[T]he history of regulation and self-regulation in the commodity industry fully justifies the public confidence that it enjoys. The Congress first adopted regulation in the commodity field, and recognized the valuable self-regulatory role of commodity markets, more than a decade before a similar legislative scheme was devised for the securities industry. The Commodity Exchange Act pioneered many protective measures for the public, some of which are only now being applied in other industries." (117 Cong. Rec. 7553 (1971))

petitioners were required to resort to the Commission for relief before coming into court." (373 U.S. at 357-358) The Court made it clear, however, that its decision was limited to the particular facts. The opinion pointed out that:

> "Were there Commission jurisdiction and ensuing judicial review for scrutiny of a particular exchange ruling * * * a different case would arise concerning exemption from the operation of laws designed to prevent anticompetitive activity, an issue we do not decide today." (373 U.S. at 358, fn. 12)

And further:

> "Should review of exchange self-regulation be provided through a vehicle other than the antitrust laws, a different case as to antitrust exemption would be presented." (373 U.S. at 360)

The instant case falls within the category of situations that the *Silver* decision reserved for application of the primary jurisdiction doctrine. In February 1968, following this Court's decision in *Silver* which underlined the absence of SEC authority to review particular instances of enforcement of rules by the exchange, Congress amended the CEA to expressly:

a) Authorize the Secretary to disapprove rules of contract markets relating to terms and conditions of contracts, other trading requirements and minimum financial requirements, which violate any provision of the CEA or regulations of the Secretary or Commission, promulgated to accomplish any of the purposes of the CEA. (7 U.S.C. 12a)

b) Require contract markets to enforce their approved rules. (7 U.S.C. 7a(8))

c) Authorize the Commission, after notice and hearing and subject to judicial appeal, to suspend or revoke the designation of an exchange as a contract market or issue cease and desist orders upon a showing that such exchange has not enforced its rules of government made a condition of designation. (7 U.S.C. 7b, 8, 8(a), 13a)

The CEA, as thus amended, granted authority to the Commission to review contract market enforcement of its rules and thus supplied the deficiency noted in *Silver* to the application of the doctrine of primary jurisdiction.[16]

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[16] In reporting favorably on the 1968 amendments of the CEA, the House Committee included the following statement:

> "The committee feels strongly that full encouragement should be given to cooperative action between the Commodity Exchange Authority and the contract markets. While progress has been made in this direction, the proposed legislation should provide an incentive for still further efforts, encouraged by the background of legal authority.
>
> "Effective regulation of the markets requires the exercise of expert and strictly impartial judgment looking toward reconciling the conflicting forces that are inevitable in commodity futures trading. The committee is impressed by the steps which have been taken in the past toward this end and submits that the enactment of H.R. 13094 will encourage constructive cooperative activity toward minimizing the effects of abusive situations, and thus improve the dignity and usefulness of the futures markets."
>
> (H.R. Report No. 743, 90th Cong., 1st Sess., to accompany H.R. Bill No. 13094, p. 1)

2. The Court of Appeals has properly reconciled antitrust aims with the public policy to be furthered by the CEA.

The central issue facing the Court in these proceedings was stated in *Silver*, with respect to similar self-regulation by securities exchanges, as:

> "[T]he need to reconcile pursuit of the antitrust aim of eliminating restraints on competition with the effective operation of a public policy contemplating that securities exchanges will engage in self-regulation which may well have anti-competitive effects in general and in specific applications." (373 U.S. at 349)

The question posited in *Silver* was whether there was "justification derived from the policy of another statute" to excuse an exchange action under the rule of reason from a claimed antitrust violation. (373 U.S. at 348-349) As the majority put it:

> "The entire public policy of self-regulation, beginning with the idea that the Exchange may set up barriers to membership, contemplates that the Exchange will engage in restraints of trade which might well be unreasonable absent sanction by the Securities Exchange Act. * * * But, under the aegis of the rule of reason, traditional antitrust concepts are flexible enough to permit the Exchange sufficient breathing space within which to carry out the mandate of the Securities Exchange Act. * * * Although, as we have seen, the statutory scheme of that Act is not sufficiently pervasive to create a total exemption from the antitrust laws, * * * it is also true that particular instances of exchange self-regulation which fall within the scope and purposes of the Securities Exchange Act may be regarded as justified in answer to the assertion of an antitrust claim." (373 U.S. at 360-361)

This policy of self-regulation and the stated criteria for accommodation of the two systems are precisely applicable to the CEA. Mr. Justice Stewart, in his dissent in *Silver*, cogently expressed the principles that should control the application of antitrust claims to self-regulating exchanges under the Securities Exchange Act (and we submit that the same principles apply to exchanges under the CEA), as follows:

> "The purpose of the self-regulation provisions of the Securities Exchange Act was to delegate governmental power to working institutions which would undertake, at their own initiative, to enforce compliance with ethical as well as legal standards in a complex and changing industry. This self-initiating process of regulation can work effectively only if the process itself is allowed to operate free from a constant threat of antitrust penalties. To achieve this end, I believe it must be held that the Securities Exchange Act removes antitrust liability for any action taken in good faith to effectuate an exchange's statutory duty of self-regulation. The inquiry in each case should be whether the conduct complained of was for this purpose. If it was, that should be the end of the matter so far as the antitrust laws are concerned—unless, of course, some antitrust violation other than the mere concerted action of an exchange and its members is alleged." (373 U.S. at 371)

Under these principles, it was appropriate for the Court of Appeals to require prior resort to the Commission to determine whether a CME rule was violated; whether CME acted in good faith to effectuate its statutory duty of self-regulation; whether disciplinary action under the CEA should be imposed; or whether CME's action involved a minor violation which in the public interest did

not require disciplinary measures to be taken. The Commission's decision is subject to judicial review. When filed with the District Court, the agency's determination may be considered in connection with the antitrust claim.

By this means, the integrity of the self-regulation system is protected in the specific areas of the Commission's authority. *United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1963), so heavily relied upon by petitioner and the United States as *amicus*, fully supports this view. The Court there said with respect to primary jurisdiction:

> "That doctrine requires judicial abstention in cases where protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme. • • • Court jurisdiction is not thereby ousted, but only postponed." (374 U.S. at 353)

3. The Commission's inability to award treble damages and attorneys' fees is no bar to its exercise of primary jurisdiction.

Petitioner argues further that any judicial deference to the Commission would be futile and therefore improper since neither the Secretary nor the Commission can grant the relief sought, namely treble damages and an allowance of attorneys' fees. (Pet. Br. 23-26) The United States as *amicus* seems also to so argue. (U.S. Br. 20 fn. 9, 24) This Court answered that contention in *Pan American Airways, Inc.* v. *United States*, 371 U.S. 296, 313 fn. 19 (1963), as follows:

> "If it were clear that there was a remedy in this civil antitrust suit that was not available in a § 411 proceeding before the C.A.B., we would have the kind of problem presented in Hewitt-Robins Inc. v. Eastern Freight-Ways, Inc. 374 U.S. 84, • • • where liti-

gation is held by a court until the basic facts and findings are first determined by the administrative agency, so that the judicial remedy, not available in the other proceeding, can be granted."

See also, Jaffe, *Primary Jurisdiction*, 77 *Harv. L. Rev.* at 1057; *S.S.W., Inc.* v. *Air Transport Ass'n*, 191 F.2d 658 (D.C. Cir. 1951).[17]

[17] Even where an agency does not have the power to immunize from antitrust liability, prior recourse has been directed on "practical considerations [which] dictate a division of functions • • • under which [the agency] makes a preliminary, comprehensive investigation of all the facts, analyzes them, and applies to them the statutory scheme as it is construed." *Federal Maritime Bd.* v. *Isbrandtsen Co.*, 356 U.S. 481, 498 (1958).

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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July 1972

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-858

THOMAS RICCI,

Petitioner,

vs.

CHICAGO MERCANTILE EXCHANGE, an Illinois not-for-profit corporation, EVERETTE B. HARRIS, WILLIAM PHELAN, LEO MELAMED, THE SIEGEL TRADING COMPANY, a corporation, and JOSEPH E. SIEGEL,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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SUPPLEMENTAL APPENDIX

EXCERPTS FROM ORAL DEPOSITION OF THOMAS RICCI TAKEN ON JUNE 19, 1969, IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, DOCKET NO. 69 C 1030

Examination By Mr. Freeman For The Defendants

Q. When did you come with Siegel?

A. I think it was in 1967.

Q. Was this the first job you had that involved the Chicago Mercantile Exchange?

A. Yes, it was.

Q. Now, what was your function at Seigel?

A. When I first came to work for Seigel I

started out as a runner on the floor. My function
7 was to bring orders to the brokers in the pit.

From there, I became a phoneman on the floor. My function was to write up orders and give them to the runners.

Then, I was moved up into the office. I ran the order desk upstairs. My function there was to take orders from different offices and put them into the different commodity exchanges.

8 Q. When did you start working for Siegel?

A. I think it was 1967.

Q. When did you become a member of the Chicago Mercantile Exchange? • • • Was it May of 1967?

• • •

The Witness: Yes.

45 Q. Now, Mr. Ricci, did you have occasion to appear before the Board in connection with the attempt by Mr. Joe Siegel to transfer your membership in February, 1969?

A. Yes, before the attempt was made, I had.

• • •

Q. And at that time you made a statement before the Board, didn't you?

A. I may have. I said a lot of things. The only thing I said would be a statement, correct.

Q. Did you admit that you had signed the authorization to transfer on October 24, 1967 when it was presented?

A. Yes, I did.

47 Q. Was there ever a suggestion at that time made that the controversy be submitted to arbitration as the easiest method of resolving it?

A. For the membership?

Q. The membership question, yes, as to whether or not it belonged to Joe Siegel or Tom Ricci?

A. Yes.

Q. Did you before the Board agree that you would go to arbitration?

A. Yes.

RICCI DEPOSITION EXHIBIT NO. 10

February 13, 1969

Mr. Harry Fortes
110 N. Franklin Street
Chicago, Illinois

Dear Mr. Fortes:

This is in response to your letter of February 11, relative to your client, Exchange member Mr. Thomas C. Ricci. To date I have received no authorization to transfer this membership, and, of course, it has not been transferred.

Be assured that the rules of the Exchange will be observed in this or any related matter which may come up in the future.

Sincerely yours,
Everette B. Harris
President

TRANSCRIPT OF PROCEEDINGS BEFORE THE HONORABLE JAMES B. PARSONS, ONE OF THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS IN CHICAGO, ILLINOIS, HELD ON SEPTEMBER 29, 1969, AT 10:15 A.M.

Present:

Mr. Fred J. Ginsberg,
on behalf of the Plaintiff;

Mr. Jerrold E. Salzman,
on behalf of Defendant Chicago Mercantile Exchange;

Mr. Max Chill,
on behalf of certain defendants.

The Court: When you have a motion to dismiss, I would rather you go ahead with that, brief it, if you have to, and let me decide that before you expend the time and energy of going ahead with depositions. If you need to depose your parties in order to oppose a motion to dismiss that is made on its face, unless that motion to dismiss is supported by affidavits—

Mr. Ginsberg: I think their motion to dismiss quotes from the deposition taken of the plaintiff.

Mr. Salzman: Of the plaintiffs.

Mr. Ginsberg: Absolutely. That is exactly the point. We say that we have to take the depositions of the defendants, to attach that to our reply to counteract some of the statements that they have got in their motions.

The Court: Do you mean the plaintiff didn't tell the truth?

Mr. Ginsberg: Oh, he sure told the truth.

Mr. Salzman: That is our point, your Honor. They are taking our people to counteract their own persons' statements, and that doesn't seem to follow, does it?

November, 1971

RULES OF THE CHICAGO MERCANTILE EXCHANGE

CHAPTER 4 — ENFORCEMENT OF RULES

400. GENERAL PROVISIONS.—The Board has adopted rules, and from time to time adopts amendments and supplements to such rules, to assure a free and open market on the Exchange, to insure the integrity of contracts on the Exchange, to maintain proper and dignified trading conduct and to provide the maximum protection to the public in its contacts with the Exchange and its members. To that end, the Board has appointed officers and created committees to which it has delegated responsibility for the investigation, hearing and imposition of penalties for violations of the rules of the Exchange. The delegation of such responsibility and authority shall in nowise limit the authority of the Board to deal ultimately with all rule violations, either on its own initiative or upon appeal, and nothing in this chapter shall release the president of his duties and responsibilities to secure enforcement of the rules of the Exchange.

401. CLASSIFICATION OF OFFENSES.—Offenses against the Exchange shall be major offenses and minor offenses. Major offenses shall be punishable by expulsion, suspension, fine of not more than $10,000.00, or by both suspension and fine. Minor offenses shall be punishable by a fine of not more than $2,500.00 or suspension for not more than one year, or both.

402. MAJOR OFFENSES.—It shall be a major offense:

a. to be interested in, operate, or knowingly represent or make any transaction with a bucket-shop;
b. to be guilty of any dishonest conduct;
c. to be guilty of fraud or any act of bad faith;
d. to make or report a false or fictitious trade;
e. to attempt extortion;
f. to buy or sell any commodity intending to make default on such purchase or sale;

g. to act as both buyer and seller in the same transaction;

h. to manipulate or attempt to manipulate prices or to corner or attempt to corner the market;

[1] i. to make a material misstatement to the Board, or to a Committee, or any information supplied to the Exchange or its Officers;

j. to knowingly disseminate false, misleading or inaccurate reports concerning crop or market information or conditions that affect or tend to affect the price of any commodity upon the Exchange;

k. to be found guilty of a second violation of the same rule or the same minor offense;

l. to trade or accept margins after insolvency;

m. to refuse to appear before the Board, president, Business Conduct Committee, Clearing House Committee or Floor Practices Committee at a duly convened investigative hearing or in connection with any investigation; to refuse to fully answer all questions and produce all books and records at such hearing or investigation or to testify falsely;

n. to make use of or reveal any confidential information obtained by reason of participating in any investigative proceedings or any hearing;

o. to accept directly or indirectly a trade for the account of a non-member employed on the floor of the Exchange;

p. for a member, clearing member, or sub-broker to permit the use of its facilities by members or non-members in a manner that impairs the dignity or degrades the good name of the Exchange, or creates a market or other situation detrimental to the Exchange, or results in violation of the speculative limit rules, or effectuates manipulations or corners, or attempts of either;

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[1] Revised August, 1971.

q. for a clearing member or sub-broker to fail to maintain minimum financial requirements;
r. to commit an act which is substantially detrimental to the interest or welfare of the Exchange;
s. to refuse to submit to arbitration any dispute which the president or the Board, on appeal, decides should be arbitrated; or to refuse to comply with a final arbitration award;
t. to refuse, after hearing, to comply with an order of the Board, the president or any hearing committee; or
u. to violate a rule which recites such violation is a major offense.

403. MINOR OFFENSES.—It shall be a minor offense:
a. to be guilty of dishonorable conduct;
b. to be guilty of uncommercial conduct;
c. to be guilty of any conduct which has a manifest tendency to impair the dignity or the good name of the Exchange;
d. to interpose a Statute of Frauds defense to any claim for breach of an Exchange contract;
e. to make a false entry upon a clearing sheet;
f. to violate any rule, the violation of which is not a major offense.
[1] g. To circulate or aid in the circulation in any manner of rumors which tend to reflect on the integrity of any contract.

404. DELEGATION AND JURISDICTION OF ENFORCEMENT AUTHORITY.

A. The President

1. Rule Violations—

It shall be the duty of the president to enforce the rules of the Exchange, and to this end: he shall have available to him at all times the facilities of the Department of Audits and Investigations to conduct

[1] Adopted August, 1971.

investigations of rule violations and market conditions; he shall have authority to inspect the books and records of all members; he may require any member to appear before him and produce his books and records and answer questions regarding a violation of the rules of the Exchange.

If the president suspects that a rule of the Exchange has been violated, he shall make an investigation or cause the Department of Audits and Investigations to conduct an investigation. If the president has reasonable cause to believe that any member has violated an Exchange rule, the president shall notify such member in writing of the violation of which he is suspected and shall fix a time and place for a hearing, at which time the member shall appear and have the right to be heard in his own behalf. Dependent upon the violation involved, such hearing shall be held at the president's direction either before: the president; Business Conduct Committee; Clearing House Committee; Floor Practices Committee; or the Board.

[1] 2. Emergencies—

If the president determines:

a. that the free and orderly market in a commodity is or is likely to be disrupted; or

b. that the ordinary or normal functioning of the Exchange has been or is likely to be disrupted,

he may, with the consent of the chairman of the board and either the chairman of the Business Conduct Committee or the Clearing House Committee take such action or direct any member, clearing member, sub-broker, or member by virtue of assignment of rates, to take such action that may, in the president's sole discretion, seem necessary to prevent, correct or alleviate such condition.

3. Emergency Financial Conditions—

If the president determines that the financial condition of any clearing member or sub broker is such

[1] Revised October, 1971.

as his continued operation would jeopardize the integrity of the Exchange, the president may proceed against said clearing member or sub-broker in accordance with rule 907, 929 or 930.

The Board may exercise any of the authority and power which by these rules are vested in the president, any committee or other representatives of the Exchange. The Board may also, when it deems that an emergency exists, stop trading in any future contracts and, notwithstanding any other Exchange rules, determine the manner in which deliveries shall be made or fix a settlement price at which all such contracts shall be closed out.

All Exchange contracts shall be subject to this rule and are accordingly modified to the extent necessary to comply with the action taken hereunder.

B. The Business Conduct Committee

The Business Conduct Committee shall have general supervision of matters described in Rule 222, and shall have the jurisdiction to enforce the rules pertaining to the following:

1. Attempts to manipulate and manipulations of prices and attempts to corner and corners of any commodity on the Exchange;
2. Conduct of member detrimental to the good name of the Exchange; and
3. Business conduct of and compliance with Exchange rules and regulations by members, including conduct affecting non-members and the public, except insofar as jurisdiction over the conduct of clearing members, sub-brokers and solicitors is assigned to the Clearing House Committee by 404C hereof.

The Business Conduct Committee may conduct hearings on rule violations falling in the above defined categories either on its own initiative, by reference from the president, the Audits and In-

vestigations Department, the Public Relations Department, the Floor Practices Committee or any other committee.

C. The Clearing House Committee

The Clearing House Committee shall have general supervision of matters described in Rule 223 and shall have jurisdiction to enforce the rules pertaining to the following:

1. Manner of clearing trades;
2. Functioning of the Clearing House;
3. The financial integrity of clearing members and sub-brokers; and
4. Business conduct of and compliance with Exchange rules and regulations by clearing members, sub-brokers and solicitors, except insofar as jurisdiction over manipulations and corners is assigned to the Business Conduct Committee by 404B hereof.

The Clearing House Committee may conduct hearings on rule violations falling in the above defined categories either on its own initiative or by reference from the president or the Audits and Investigations Department.

D. The Floor Practices Committee

The Floor Practices Committee shall have general supervision of matters described in Rule 226 and shall have general jurisdiction to enforce the rules contained in Chapter 7 and all rules relating to floor practices and trading ethics. The Floor Practices Committee may conduct hearings on rule violations falling in the above defined categories either on its own initiative or by reference from the president.

405. INITIAL INVESTIGATION BY PRESIDENT AND ASSIGNMENT FOR HEARING.—If after investigation the president has reasonable cause

to believe that a member has violated a rule of the Exchange and that the matter may best be dealt with by the president, he shall set the matter for hearing by his own office. If the president has reasonable cause to believe an offense has occurred which may best be dealt with by the Business Conduct Committee, Clearing House Committee or Floor Practices Committee, he shall transmit to the chairman of the committee having jurisdiction of the offense a written statement setting forth the charges against the member involved and request that a hearing be held. If after investigation by the president, or after hearing before the Business Conduct Committee, Clearing House Committee or Floor Practices Committee there is reasonable cause to believe that the violation of the rule or offense committed is of sufficient importance to warrant a direct hearing before the Board, then the president or committee chairman shall file with the chairman of the board his written statement setting forth the charges or, if a hearing has been held, the findings and recommendations of the hearing body.

406. CONDUCT OF HEARINGS.—All hearings shall be commenced by notifying the member under investigation in writing of the offense with which he is charged. A reasonable time and place for the hearing shall be included in the notice. The hearing body shall have power to compel any member to attend, to testify and to produce all books and records relevant to the subject matter under investigation.

The members of the hearing body may actively question and examine all evidence or they may request an official of the Department of Audits and Investigations to conduct the examination. The member under investigation may testify and produce evidence in his own behalf and cross-examine any witness.

The member may be represented by another member of the Exchange, but may not be represented by legal counsel or by a member of the Board or of the investigating committee.

All testimony and documents produced in connection with a hearing conducted pursuant to this Chapter 4 shall be deemed confidential and shall not be revealed or otherwise used, except in connection with disciplinary proceedings resulting from that hearing. After hearing, the hearing body shall determine guilt or innocence. A member found not guilty shall not again be charged with or tried for the same offense. In all cases, the chairman of the hearing committee shall promptly file a written report of its findings, decisions or recommendations with the president, the chairman of the board, the full committee (if the hearing committee is a subcommittee thereof) and the member who was charged.

407. HEARINGS, FINDINGS AND PENALTIES.[1]

A. Original Hearings before the Board

Whenever an original hearing is scheduled to be held before the Board, the Chairman shall determine whether the matter shall be held before the Board as a whole, or before a Hearing Committee of the Board.

1. Board as a Whole—In the event the matter is held before the Board as a whole, it shall be held before at least a quorum of the Governors at a duly constituted meeting. The hearing shall be conducted by the Chairman and shall require the affirmative vote of seven Governors for a finding of guilty on a major offense and the affirmative vote of a simple majority for a finding of guilty on a minor offense.
2. Hearing Committee—In the event the matter is held before a Hearing Committee of the Board,

[1] Revised August, 1971.

the Chairman shall appoint four Governors to serve on said Committee. The hearing shall be conducted by the Chairman, or in his absence or upon his order, by the First Vice-Chairman or Second Vice-Chairman. A unanimous decision by the members of the Hearing Committee shall be considered the action of the Board as a whole.
In the event a unanimous decision by the Hearing Committee cannot be obtained, the Chairman shall refer the matter to the Board as a whole. The Board shall review the evidence submitted to the Hearing Committee at a special or regular meeting and shall vote on the matter in accordance with Rule 407 A-1 hereof.

B. Hearings before the President

Hearings before the president shall be conducted by the president, or in his absence by the vice president in charge of audits and investigations. In the event that the president determines that member is guilty of the violation or offense charged, he may order suspension for a period not to exceed one year or assess a fine within the limits of Rule 401, or both. In case of a finding of guilt, the president shall promptly provide the member with the written findings and the amount of any fine or term of suspension. The member shall pay any fine assessed within five days of receipt of notice, or be denied all privileges of membership thereafter until such fine is paid.
If the president decides that the matter is of major importance, he may refer the matter to the Board for hearing.

C. Hearings before the Business Conduct Committee

1. Rule Violations—
Hearings by the Business Conduct Committee shall be before the members or alternates of that committee and shall be conducted by the committee chairman, who shall not have a vote.

The committee shall decide by a majority vote whether the member is guilty of the violation or offense charged. If the accused member is found guilty, the Business Conduct Committee may:

a. Order the member to cease and desist from the conduct found to be in violation of the rules or contrary to the best interest of the Exchange.
b. Order the member to liquidate such portion of the open contracts in the member's proprietary or customers' accounts, or both, as the committee deems necessary to insure the integrity of the Exchange contracts or to insure an orderly and liquid market.
c. Order the member to deposit such additional margins with the Exchange as the committee deems necessary to protect the integrity of open contracts.
d. Impose a period of suspension against the member not to exceed 10 days.
e. Impose a fine against the member not to exceed $5,000.00.
f. Impose advertising restrictions pursuant to these rules.

If the committee shall decide by a majority vote that the matter is of major importance or might warrant a penalty in excess of its own authority, the chairman of the committe shall refer the matter to the Board for further hearings and decision.

2. Emergency Actions—

Whenever, as a result of investigation by the Department of Audits and Investigations, the Business Conduct Committee determines that the integrity of any contract is in jeopardy, or the liquidity of any contract is threatened, it may:

a. Order the liquidation of such portion of the open contracts in any member's proprietary or customers' accounts, or both, as the committee deems necessary.

b. Order a member or his customers to deposit such additional margin with the Exchange as the committee deems necessary.

In addition to the foregoing, the committee may, with consent of both the president and the chairman of the board:

c. Order that trading in a specific contract be limited to closing of open positions.

d. Order that trading be limited to a confined price range.

e. Order such other action as is deemed necessary to insure the integrity of the Exchange contracts or to insure an orderly and liquid market.

D. Hearings before the Clearing House Committee

Hearings by the Clearing House Committee shall be conducted by the chairman of the committee, who shall not have a vote, and three members of the committee chosen by lot from among those available committee members who have not previously participated in a hearing, or from among the available committee members who have had the least participation.

The hearing sub-committee shall decide by a majority vote whether the member is guilty of the of the violation or offense charged and its decision shall be considered the action of the full Clearing House Committee.

If the accused member, after hearing, is found guilty or is found to be in a financial condition which jeopardizes the integrity of the Exchange, the hearing sub-committee may:

1. Order the member to cease and desist from the conduct found to be in violation of the rules or contrary to the best interests of the Exchange.
2. Order the member to deposit such additional margin with the Exchange as is deemed necessary to protect the integrity of open contracts.
3. Prescribe such additional capital requirements as it deems necessary.
4. Prescribe such position limitations as it deems necessary.

5. Impose a fine against the member not to exceed $5,000.00.
6. Suspend a clearing member or sub-broker if it finds that the financial condition of such clearing member or sub-broker is such that it jeopardizes the integrity of the Exchange, subject to approval of any two of the following: the president, the chairman of the board, and chairman of the Clearing House Committee. In the event of a suspension, the member's facilities and open trades shall remain suspended for liquidation only, until the matter is finally determined by the Board.

If the sub-committee, by majority vote, shall decide that the matter is of major importance or might warrant a penalty in excess of its own authority, the chairman of the sub-committe shall refer the matter to the Board for further hearings and decision.

E. Hearings before the Floor Practices Committee

Hearings by the Floor Practices Committee shall be conducted by the chairman of that committee, who shall not have a vote, and shall be held before the members of that committee.

The committee shall decide by a majority vote whether the member is guilty of the violation or offense charged. If the accused member is found guilty, the Floor Practices Committee may:

1. Order the member to cease and desist from the conduct found to be in violation of the rules or contrary to the best interests of the Exchange.
2. Impose a period of probation.
3. Impose a fine against the member not to exceed $1,000.00.

If the committee, by majority vote, shall decide that the matter is of major importance or might warrant a penalty in excess of its own authority, the chairman of the committee shall refer the matter for hearing and decision to the Board, or to the Business Conduct Committee.

408. APPEAL TO THE BOARD.—If, after hearing, a member is found guilty of an offense, he may appeal to the Board within 10 days after the receipt of the findings and decision of the president, Business Conduct Committee, Clearing House Committee or Floor Practices Committee, as the case may be. On such appeal, the Board shall review the charges levied, the record made before the president or committee, the findings and decision appealed from, the notice of appeal and any written memorandum which the accused member may wish to file, provided such memorandum is filed with the secretary of the Exchange within five days after notice of appeal.

[1] Appellate hearings before the Board shall be conducted by the chairman and require the presence of at least nine other governors. An affirmative vote of two-thirds shall be necessary to set aside or modify the findings and decision of the president or the committee from which the appeal was taken.

Filing of notice of appeal shall not suspend the order or decision of the president or committee unless the president or the chairman of the involved committee specifically directs that the decision be stayed.

409. REHEARING.—A member may have a rehearing by the Board if a petition is filed within 10 days of initial action by the Board and it is established that the disciplinary action taken was the result of false testimony, was too severe or otherwise improper.

410. EFFECT OF SUSPENSION.—A suspended member may not trade on the Exchange in person or by employee or by broker, except at the regular commission rates of a non-member, or have any of the privileges of a member during the time of his suspension. Members are forbidden to trade as broker or employee for a suspended member except at the regular non-member's commission rate. A suspended member may be reinstated upon such conditions as

[1] Revised October, 1971.

the Board may impose. A suspended member shall not be allowed to visit the Exchange floor during trading hours except in the instance where special permission is granted by the Board and such permission does not conflict with C.E.A. findings.

411. EXPELLED MEMBER.—An expelled member shall forfeit all privileges of membership, and may not trade on the Exchange, either in person or by employee, or by broker, except at the regular commission rate of a non-member. An expelled member shall not be allowed to visit the Exchange floor during trading hours.

The membership of an expelled member must be sold and transferred on the books of the Exchange within 30 days after the member's expulsion. If, after 30 days, the membership has not been so transferred, it shall be sold at public auction under the direction of the president, following the procedures set forth in Rule 307.

412. OPEN TRADES OF SUSPENDED OR EXPELLED CLEARING MEMBERS.—When a clearing member is suspended or expelled for a violation of these rules, other than for insolvency or default on his obligation to the Clearing House, he may designate a floor broker to close out his open trades in accordance with the Board's direction.

413. PUBLICATION OF RULE VIOLATIONS.—Whenever a member is found guilty of a major offense, or a minor offense which in the opinion of the president is of major consequence, his name together with the rule violated and the penalty assessed, shall be included in the monthly Executive Reports to the membership.

414. SUSPENSION OR EXPULSION VACATES OFFICE.—Any officer, governor or member of any committee of the Exchange, when suspended or expelled from membership, shall be considered automatically removed from office or position.

415. REINSTATEMENT BAR TO FURTHER DISCIPLINE.—If a member is reinstated after suspension, or re-elected after expulsion, he shall not again be disciplined for the original offense.

416. MEMBER'S INDEMNIFICATION LIABILITY TO THE EXCHANGE.[1]—Each member, clearing member, sub-broker, associate-broker or member by virtue of assignment of rates, shall indemnify and hold the Exchange harmless for the full amount of any judgments or settlements, paid by it in respect to any legal proceeding brought against the Exchange as a result of an alleged violation of any laws or rules of the Exchange by said member, clearing member, sub-broker, associate-broker, or member by virtue of assignment of rates, or as a result of an alleged failure of the Exchange to detect, prevent, or otherwise act against said alleged violation.
Any charges arising out of this rule shall be subject to liens as provided in Rule 309, paragraph (a).

(End of Chapter 4)

[1] Adopted August, 1971.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-858

THOMAS RICCI,

Petitioner,

vs.

CHICAGO MERCANTILE EXCHANGE, an Illinois not-for-profit corporation, EVERETTE B. HARRIS, WILLIAM PHELAN, LEO MELAMED, THE SIEGEL TRADING CO., INC., a corporation, and JOSEPH E. SIEGEL,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR THE RESPONDENTS, THE SIEGEL TRADING CO., INC., a corporation, and JOSEPH E. SIEGEL

OPINIONS BELOW.

The decision of the United States District Court for the Northern District of Illinois, Civil Action No. 69 C 1030 (1970) (unpublished), the opinion of the United States Court of Appeals for the Seventh Circuit, 447 F. 2d 713 (7th Cir., 1971), and the order of the Court of Appeals, sitting *en banc,* denying the Petition for Rehearing on the Issue of Primary Jurisdiction (unpublished), appear in Petitioner's Appendix.

JURISDICTION.

These Respondents do not question the jurisdiction as set forth in Petitioner's brief.

STATUTES, REGULATIONS AND RULES INVOLVED.

The statutes involved in this case are:

Clayton Act, § 4, 15 U.S.C. § 15, which is reprinted in the Addendum attached to this brief;

Commodity Exchange Act, §§ 1-17b, 7 U.S.C. §§ 1-17b, particularly §§ 6, 6d, 6e, 7, 7a(1), 7a(2), 7a(8), 7a(9), 7b, 8, 8(a), 9, 12a, 13a, 13b, and 13c(b), the pertinent provisions of which are reprinted in the Addendum attached to this brief;

Sherman Act, § 1, 15 U.S.C. § 1, a pertinent part of which is reprinted in the Addendum attached to this brief.

The regulations involved in this case are:

Regulations of the Secretary of Agriculture, §§ 0.3, 0.8, 0.53, 0.58, 1.7, 1.8, and 1.41, 17 C.F.R. §§ 0.3, 0.8, 0.53, 0.58, 1.7, 1.8 and 1.41, pertinent parts of which are reprinted in the Addendum attached to this brief.

The Rules involved in this case are the following Rules of the Chicago Mercantile Exchange:

Rule 500, which is reprinted in the Argument of this brief; and Rules 307, 311, 313, 322 and 324, which are reprinted in Petitioner's Appendix, pp. 8-10.

QUESTIONS PRESENTED.

The questions presented are as follows:

1. Whether, having found that a complaint properly alleges group boycott, a *per se* violation of Section 1 of the Sherman Act, 15 U.S.C. §1, by a commodities exchange, its officers and a member, the Court of Appeals erred in ordering that the proceedings be stayed until such time as the Commodity Exchange Commission and/or the Secretary of Agriculture may act upon it.

2. Whether the Commodity Exchange Act and the doctrines of *Silver* v. *New York Stock Exchange* and *Thill Securities Corp.* v. *New York Stock Exchange* confer upon the Commodity Exchange Commission and/or the Secretary of Agriculture power to exercise primary jurisdiction and grant a partial exemption from the antitrust laws to commodity exchanges and the members thereof when exchange rules and actions provide for hearing upon the alleged wrongful transfer of an exchange membership.

STATEMENT.

This action was brought by Plaintiff-Petitioner, Thomas Ricci (hereinafter referred to as "Plaintiff") for treble damages under Section 4 of the Clayton Act, 15 U.S.C. §15. The Defendants are the Chicago Mercantile Exchange (hereinafter referred to as "CME"); three of its officers, Everette B. Harris, William Phelan, and Leo Melamed; and one of its members, Joseph E. Siegel, and The Siegel Trading Co., Inc., (hereinafter collectively referred to as "Siegel").

The case arises on the motion of the defendants to dismiss the complaint for failure to state a cause of action and for lack of jurisdiction.

Plaintiff's complaint, in the first ten paragraphs, alleged the jurisdiction and venue for bringing the action in the federal court, then described the parties to the action, then cited Rules 307, 311, 313, 322 and 324 of the CME and further alleged:

He purchased a membership on the CME on or about May 1, 1967, and thereafter engaged in business as a broker and trader of commodity futures on the CME. (A. 10). On or about February 11, 1969, the CME "wilfully, unlawfully, knowingly and maliciously confederated, combined, conspired and agreed with Siegel" to prevent plaintiff from continuing as a member of the CME. (A. 11). On or about February 11, 1969, plaintiff was informed by the CME that Siegel claimed ownership of his membership. (A. 11). Plaintiff notified the CME that Siegel was indebted to him in the amount of approximately $18,175.00 for floor brokerage fees and that plaintiff owed Siegel $15,000.00 for a loan to purchase the

membership. (A. 11). Defendant Phelan requested plaintiff to present his claim to the membership to the CME by virtue of Exhibit A which is attached to the complaint. (A. 11-12, 20). Siegel induced the CME to violate its rules to deprive plaintiff of his membership and to deny him trading privileges. (A. 12). The individual defendants and Siegel caused the CME to transfer plaintiff's membership to a third party and until plaintiff was able to purchase another membership on March 4, 1969, he was unable to trade and thus was damaged in his business and property. (A. 13).

The District Court allowed the motions of the defendants to dismiss the complaint on November 25, 1969.

The Court of Appeals on June 17, 1971, unanimously concluded that "absent any justification from the Exchange's status as a designated 'contract market' [under the Commodity Exchange Act, 7 U.S.C. §§1-17b], the complaint is sufficient to allege a group boycott, a *per se* violation of Section 1 of the Sherman Act." (A. 37). Then the Court of Appeals (Kerner, J., dissenting), relying on *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963), and *Thill Securities Corp.* v. *New York Stock Exchange*, 433 F. 2d 264 (7th Cir., 1970), *cert. denied*, 401 U.S. 994 (1971), reversed the judgment and remanded the action to the District Court with directions to stay the proceedings until such time as the Commodity Exchange Commission and/or the Secretary of Agriculture may act upon it. (A. 45).

On October 5, 1971, the Court of Appeals, sitting *en banc*, denied plaintiff's petition for rehearing. (A. 53).

This Court granted plaintiff's Petition for Writ of Certiorari to the Court of Appeals on February 28, 1972.

SUMMARY OF ARGUMENT.

The pleadings in this case present the proper situation for the exercise of primary jurisdiction by the Secretary of Agriculture and/or the Commodity Exchange Commission (hereinafter collectively referred to as the CEC) for study of the case in relation to the Commodity Exchange Act (CEA), rules and regulations of the CEC and Chicago Mercantile Exchange (CME), and the application of the antitrust laws to these statutes and rules. *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963), established the doctrine that a securities exchange is exempt under certain circumstances from the antitrust laws upon taking what otherwise would be anticompetitive action. The exemption is dependent upon a self-regulatory "scheme which performs the antitrust function of insuring that the exchange will not in some cases apply its rules so as to do injury to competition which cannot be justified as furthering legitimate self-regulative ends." *Id.* at 358. The *Silver* doctrine was amplified by *Thill Securities Corp.* v. *New York Stock Exchange*, 433 F. 2d 264 (7th Cir., 1970), *cert. denied*, 401 U.S. 994 (1971), which brought into play the role of the administrative agency in supervising the enforcement of exchange rules. *Thill* indicated that whether primary jurisdiction would lie depended in part upon the following factors: (1) The agency's power to weigh antitrust policy in fulfilling its duty of review of exchange self-regulation; (2) the ability of an aggrieved party to initiate agency review under the regulatory act; (3) the extent agency expertise would be useful in resolving the

question of whether the exchange rule was necessary to make the regulatory act work; and (4) the possibility of achieving the aims of the Sherman Act without subjecting exchanges to treble damage suits.

In a general way, the CEA and the CEC establish an analogous regulatory scheme to that of the securities industry. The exchange action in the instant case meets the requirements of *Silver* for exemption. Plaintiff failed to allege that the CME rules did not provide for notice and hearing. Actually, plaintiff could have availed himself of the CME's arbitration procedure under CME Rule 500. He did not allege that he attempted to pursue this remedy.

The case also falls within the guidelines of *Thill*. The CEC has the power to weigh antitrust policy pursuant to section 13c(b) of the CEA, which provides that the CEC may refrain from reporting minor violations of the CEA for prosecution whenever it appears that the public interest does not require it. Since the antitrust laws were passed to protect the public and not to foster private rights, the words "public interest" in section 13c(b) can be interpreted to mean "antitrust policy". Violations of the CEA which the CEC could refrain from reporting would include nonenforcement by the CME of its rules pursuant to sections 8(a) and 13a of the CEA by: (1) tampering with the membership of a member required to register under section 6 of the CEA, and thus failing to enforce bylaws relating to trading requirements pursuant to section 7a(8); and (2) failing to keep records of its meetings and those of its committees, clearly describing all matters discussed, pursuant to section 7a(2).

The second requirement of *Thill* is fulfilled by the Rules of the CEC. 17 C.F.R. §§ 0.3 and 0.53 allow any interested person having information of a violation to file an application requesting the institution of proceedings before the Secretary or the CEC. Sections 0.8 and 0.58 allow the Secretary and CEC to permit any person to intervene in a proceeding. The CEC possesses greater familiarity with the CEA and the rules of the CEC and CME than the courts. Furthermore, it is helpful to the courts if the agency interprets its own regulatory statute and then passes on its point of view to the courts. The fourth guideline of *Thill* dovetails with the first. The first embraces the agency's authority under the statute and general rules of the doctrine of primary jurisdiction. The fourth takes agency policy and the consequences thereof into account. Because exchanges tread a tightrope over an abyss of antitrust liability, *Silver* stated that it is desirable for the exchanges to receive protection from the antitrust laws under the umbrella of the regulatory agency if the exchange makes a reasonable effort at self-regulation. If there were no antitrust immunity, the exchanges, which are vital to the nation's economy, would be unable to operate.

ARGUMENT.

I.

THE COMMODITY EXCHANGE COMMISSION HAS PRIMARY JURISDICTION OF THE INSTANT CASE.

A. Pursuant to the Silver Case, the Commodity Exchange Act (CEA), and the Rules of the Secretary of Agriculture and the Commodity Exchange Commission (CEC) and the Chicago Mercantile Exchange (CME), the CEC Should Be Given an Opportunity to Weigh Antitrust Policy in This Matter Before It Is Heard in the Courts.

The doctrine of primary jurisdiction applies when a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case, the judicial process is suspended pending referral of such issues to the administrative body for its views. *United States* v. *Western Pac. R.R.*, 352 U.S. 59, 63-64 (1956).

The doctrine arose out of judicial recognition of the need for orderly and sensible coordination of the work of agency and court and judicial realization that a court should not act upon subject matter that is peculiarly within the agency's specialized field without taking into account what the agency has to offer. *Far East Conference* v. *United States*, 342 U.S. 570, 574-575 (1952). The doctrine serves as a device to prepare the way, if litigation should take its ultimate course, for a more informed and precise determination by the court of the scope and

meaning of the regulatory statute as applied to those particular circumstances. *Federal Maritime Bd.* v. *Isbrandtsen Co.*, 356 U.S. 481, 498-499 (1958).

One of the most important practical effects of the application of the doctrine is that in some cases, an implied exemption of a regulated industry from the antitrust laws can arise. Under some regulatory schemes, the agency is not strictly bound by the dictates of the antitrust laws, but can and does approve actions which violate antitrust policies where other economic, social and political considerations are found to be of overriding importance, provided that the agency takes into consideration the antitrust question. *Northern Natural Gas Co.* v. *Federal Power Comm'n*, 399 F. 2d 953 (D.C. Cir., 1968). These other considerations are given particular weight in the stock exchange, tobacco warehouse and trade association cases. These cases are viewed not as an exception to the general rule that an agreement in restraint of trade is a *per se* violation of the antitrust laws, but as distinguishable because the presumed purpose of the group action, generally with some degree of state control, is not to eliminate or exclude competition but, instead, to improve public service. *Norfolk Monument Co.* v. *Woodlawn Memorial Gardens, Inc.*, 404 F. 2d 1008, 1012 n.3 (4th Cir., 1968).

The traditional primary jurisdiction cases have involved transportation cases which were referred to the Interstate Commerce Commission (ICC), the oldest regulatory agency and one with extensive and detailed authority over an industry governed by a legislative scheme whose policy is to control competition rather than to foster it. The question of whether primary jurisdiction

applies becomes more difficult when a court is confronted with a less-established regulatory scheme and regulatory agency, such as the Commodity Exchange Act (CEA) and the Secretary of Agriculture and/or the Commodity Exchange Commission, hereinafter collectively referred to as the CEC. In *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963), this Court set forth the standards and methodology for determining when a securities exchange and its members, operating under a legislative and regulatory scheme, would be exempt from antitrust liability.

In *Silver*, plaintiff was a broker who was not a member of the Exchange. Without notice to plaintiff and without giving plaintiff an opportunity for a hearing, the Exchange ordered its members to cut off their wire connections with plaintiff, which greatly damaged plaintiff's business. Plaintiff brought an action for treble damages under the Sherman and Clayton Acts. The Exchange posed the defense that the Securities Exchange Act created a duty of exchange self-regulation so pervasive as to constitute an implied repealer of the antitrust laws, thereby exempting the Exchange from antitrust liability.

This Court traced the history of the "federally mandated duty of self-policing by exchanges," *Id.* at 352, to H.R. Rep. No. 1383, 73d Cong., 2d Sess. 15 (1934), a report which led to the enactment of the Securities Exchange Act of 1934: "'The great exchanges of this country upon which millions of dollars of securities are sold are affected with a public interest in the same degree as any other great utility.'" *Id.* at 350.

"The pattern of governmental entry, however, was by no means one of total displacement of the ex-

changes' traditional process of self-regulation. The intention was rather, as Mr. Justice Douglas said, while Chairman of the S.E.C., one of 'letting the exchanges take the leadership with Government playing a residual role. . . .' Thus the Senate Committee Report stressed that 'the initiative and responsibility for promulgating regulations pertaining to the administration of their ordinary affairs remain with the exchanges themselves. It is only where they fail adequately to provide protection to investors that the Commission is authorized to step in and compel them to do so'." *Id.* at 352.

This Court went on to set forth the method by which the question of whether the regulatory scheme impliedly created an exemption from the antitrust laws could be answered: ". . . an analysis which reconciles the operation of both statutory schemes with one another rather than holding one completely ousted." *Id.* at 357, and added the caveat: "Repeal is to be regarded as implied only if necessary to make the Securities Exchange Act work." *Id.* at 357.

An analysis of the Securities Exchange Act reveals that the Securities Exchange Commission had the power to disapprove exchange rules, but did not have jurisdiction to review particular instances of enforcement of exchange rules. On the contrary, the CEA, sections 8(a) and 13a, provide:

> 8(a). The commission is authorized to suspend for a period not to exceed six months or to revoke the designation of any board of trade as a "contract market" upon a showing that such board of trade is not enforcing or has not enforced its rules of government made a condition of its designation as set forth in section 7 of this title or that such board of

trade, or any director, officer, agent, or employee thereof, otherwise is violating or has violated any of the provisions of this chapter or any of the rules, regulations, or orders of the Secretary of Agriculture or the commission thereunder. . . .

13a. If any contract market is not enforcing or has not enforced its rules of government made a condition of its designation as set forth in section 7 of this title or if any contract market, director, officer, agent, or employee of any contract market otherwise is violating or has violated any of the provisions of this chapter or any of the rules, regulations or orders of the Secretary of Agriculture or the commission thereunder, the commission may, upon notice and hearing and subject to appeal as in other cases provided for . . . make and enter an order directing that such contract market, director, officer, agent, or employee shall cease and desist from such violation. . . .

Section 7 referred to in sections 8(a) and 13a provides that a board of trade can be designated a contract market within the meaning of the CEA:

(f) When the governing board provides for making effective the final orders or decisions entered pursuant to the provisions of section 9 . . . and the orders issued pursuant to section 7a. . . .

Section 7a provides that each contract market shall—

(1) Promptly furnish the Secretary of Agriculture copies of all bylaws, rules, regulations, and resolutions made or issued by it or by the governing board thereof or any committee, and of all changes and proposed changes therein;

(2) Keep all books, records, minutes, and journals of proceedings of such contract market, and its governing board, committees, subsidiaries and

affiliates in a manner that will clearly describe all matters discussed . . . and reveal any action taken in such matters and allow inspection . . . by [the Government].

(8) Enforce all bylaws, rules, regulations, and resolutions made or issued by it or by the governing board thereof or any committee, which relate to terms and conditions in contracts of sale to be executed on or subject to the rules of such contract market or relate to other trading requirements. . . .

(9) Enforce all bylaws, rules, regulations, and resolutions made or issued by it or by the governing board thereof or any committee, which provide minimum financial standards and related reporting requirements for futures commission merchants who are members of such contract market, and which have been approved by the Secretary of Agriculture.

Section 7a(8) refers to enforcement of rules relating to trading requirements. One requirement for trading on a designated contract market is that one must be a member thereof. Commodity Exchange Act, §6. Thus failure of an exchange to follow its membership rules is a violation of section 7a(8).

The CME also is alleged to have engaged in a conspiracy, i.e. a secret meeting, to deprive Plaintiff of his membership. This would be a violation of section 7a(2), and thus through section 7(f) brings the CME within the purview of sections 8(a) and 13a.

In each of these instances, punitive action is discretionary with the CEC.

It is interesting to note that sections 8(a), 13a, 7(f), 7a(2), and 7a(8), all were enacted in 1968, after the

rendition of *Silver*. Prior to 1968, the CEC had no jurisdiction over the enforcement, non-enforcement or misenforcement of the CME's rules. It is clear that the 1968 amendments close the *Silver* loophole and confer upon the CEC jurisdiction over the CME's enforcement of CME rules.

Despite its interpretation of the Securities Exchange Act, the *Silver* Court was sympathetic to the position of the Exchange, stating at 360-361:

> "[T]he absence of power in the Commission to review particular exchange exercises of self-regulation does create problems for the Exchange. The entire public policy of self-regulation, beginning with the idea that the Exchange may set up barriers to membership, contemplates that the Exchange will engage in restraints of trade which might well be unreasonable absent sanction by the Securities Exchange Act. Without the oversight of the Commission to elaborate from time to time on the propriety of various acts of self-regulation, the Exchange is left without guidance and without warning as to what regulative action would be viewed as excessive by an antitrust court possessing power to proceed. . . . But, under the aegis of the rule of reason, traditional antitrust concepts are flexible enough to permit the Exchange sufficient breathing space within which to carry out the mandate of the Securities Exchange Act. . . . Although . . . the statutory scheme of that Act is not sufficiently pervasive to create a total exemption from the antitrust laws . . . particular instances of exchange self-regulation which fall within the scope and purposes of the Securities Exchange Act may be regarded as justified in answer to the assertion of an antitrust claim."

This court in *Silver*, over the dissent of Justices Harlan and Stewart, who agreed with the Exchange's position of almost total antitrust immunity, held that the Exchange's Act of self-regulation was unjustified because its rules did not provide for notice and hearing and it did not in fact gave Silver notice or an opportunity for a hearing.

Such is not the case here.

B. Plaintiff Failed to Avail Himself of the Regulatory Machinery of the CEA and the CME.

In an attempt to avoid the rule of *Silver* and to evade the thrust of sections 8(a) and 13a of the CEA, plaintiff alleged that his membership was transferred without notice or hearing. Yet no claim is made that the CEC was not enforcing sections 8(a) and 13a.

Indeed, the CME initiated hearing procedures by virtue of Exhibit A attached to the complaint. (A. 11-12, 20). Plaintiff failed to allege that he did pursue these hearing procedures. Furthermore, CME Rule No. 500 requires arbitration of disputes between Exchange members arising out of or related to Exchange transactions:

ARBITRATION

500. WHAT DISPUTES ARBITRATED.—It is declared to be contrary to the objects and policy of the Exchange that members should engage in litigation over disputes arising out of or related to Exchange transactions. When any such dispute occurs, either between members, or between a member and a non-member, it shall be reported within a reasonable time to the President by the party claiming to be aggrieved, and the President shall submit to the parties thereto, for their signatures, a form of agreement submit-

> ting such dispute to general arbitration. If a member refuses to arbitrate and if the matter involves or directly relates to a transaction or transactions upon the Exchange, the President shall determine whether or not the matter shall be arbitrated and he shall notify the parties in writing. A member receiving notice from the President that he is required to arbitrate shall have ten days in which to file an appeal with the Board. The appeal shall be in writing and shall state the member's reasons for refusing to arbitrate. The Board shall, after hearing, reverse or affirm the ruling of the President. Any member who, without appealing, refuses to abide by the ruling of the President or refuses to abide by the ruling of the Board after appeal shall be guilty of a major offense. After the parties have signed the agreement for arbitration the President shall refer the dispute to the Committee on Arbitration.

Plaintiff neither alleged the lack of existence of this rule nor that he was denied a hearing under this rule. It would appear that the existence of this rule and plaintiff's failure to pursue the hearing procedures would place the CME and Siegel outside the ambit of the antitrust laws and that the dispute would be subject to CEC jurisdiction under the doctrine of *Silver* and the provisions of the CEA.

Thus, despite plaintiff's contention (Brief for Plaintiff, p. 19), this case does not involve the question of whether the CME violated its own rules. The question is whether, under the provisions of the CEA, the CME established a set of rules sufficient to provide plaintiff with a hearing and whether he availed himself of said

rules. See *States Marine Lines, Inc.* v. *Federal Maritime Comm'n*, 376 F. 2d 230 (D.C. Cir., 1967).

Not only does the CEC have the power to oversee the enforcement of exchange rules under sections 8(a) and 13a, but it was given the following power by section 13c(b) of the CEA:

> 13c(b). Nothing in this chapter shall be construed as requiring the Secretary of Agriculture or the commission to report minor violations of this chapter for prosecution, whenever it appears that the public interest does not require such action.

Since the antitrust laws were enacted with the primary objective of protecting the public interest and not for the enforcement of private rights, *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 491-493 (1940), it is clear that the CEC's discretion to take public interest into account constitutes a mandate to take antitrust principles into account and to submerge them in the proper circumstances. To deny the CEC its discretion to keep within its bosom the violation alleged here would serve to destroy the statutory scheme of the CEA, spearheaded by sections 8(a), 13a, and 13c(b), which all were established by Congress in 1968, after the *Silver* case and most of the leading cases dealing with primary jurisdiction had been decided.

II.

ANSWER TO PLAINTIFF'S ARGUMENTS.

A. "Fundamental" Antitrust Policy Is Ameliorated by the Flexibility and Dynamism of the Antitrust Laws.

Concededly, the rule is firmly established that repeal of the antitrust laws by implication from a regulatory

statute will be strongly disfavored. However, the antitrust laws were not meant to be a panacea for all wrongs. *Parmelee Transp. Co.* v. *Keeshin*, 292 F. 2d 794, 804 (7th Cir., 1961), *cert. denied*, 368 U.S. 944 (1961), and do not purport to afford remedies for all torts committed by or against persons engaged in interstate commerce. *Hunt* v. *Crumboch*, 325 U.S. 821, 826 (1945). It is a living, dynamic law to be adjusted to times and to new situations. *Noerr Motor Freight, Inc.* v. *Eastern R.R. Presidents Conference*, 155 F. Supp. 768, 812 (E.D. Pa., 1957), *rev'd*, 365 U.S. 127 (1961). It has been sufficiently demonstrated that *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963), held that such an exemption exists for securities exchanges pursuant to the Securities Exchange Act under the proper circumstances. The reasoning applied in *Silver* can be applied here to the CME, CEC and CEA.

B. Immunity From the Antitrust Laws Does Not Have To Be Expressly Stated in the Regulatory Statute To Be Effective.

Plaintiff seeks to deprive the defendants of antitrust immunity by illustrating that the CEA does not expressly grant immunity. However, this approach is fallacious. An analysis of the primary jurisdiction cases from their beginning in *Texas Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), establishes that the "principal criterion in deciding whether the doctrine is applicable usually is not legislative intent but usually is judicial appraisal of need or lack of need for resort to administrative judgment." DAVIS, ADMINISTRATIVE LAW TEXT, § 19.06 (3d ed., 1972). Primary jurisdiction is an evolving, expanding concept which is not a slave to the antitrust laws.

C. The CEC Is Given the Power to Consider the Public Interest and Thus Can Determine Whether the Antitrust Laws Apply in This Case.

The application by the Court below of the four requirements for primary jurisdiction set forth in *Thill Securities Corp.* v. *New York Stock Exchange*, 433 F. 2d 264 (7th Cir., 1970), *cert. denied*, 401 U.S. 994 (1971), rebuts plaintiff's contention that the antitrust laws override the CEC's concept of the public interest. (Brief of Plaintiff, p. 22). Firstly, the CEC has power to weigh antitrust policy under its enforcement powers. Under the statutory scheme, all exchanges and members thereof must register with and report to it. Thus the CEC has a deep interest in actions of the Exchanges and members thereof which may affect the membership of one of the members. Secondly, the aggrieved party may initiate CEC review, 17 C.F.R. §§ 0.3, 0.8, or may apply to intervene, §§ 0.53 and 0.58. Thirdly, the CEC's expertise is necessary. It controls the exchanges and their members and presumably has greater knowledge of the CEA and its own rules and policy than the courts. Fourthly, the Court of Appeals has clearly demonstrated that the CEC's discretion not to report minor violations of the Act would be inconsistent with an antitrust award of treble damages. The CEC can better vindicate the public interest by utilizing the discretion granted to it by section 13c(b) than can the courts by strictly applying a statute which carries with it a treble damage penalty. Punitive damages are not favored in the law, *Brown* v. *Coates*, 253 F. 2d 36, 39 (D.C. Cir., 1958), and thus the express policy of the CEA should not be ignored.

Plaintiff's discussion of the history of the Capper-Volstead Cooperative Marketing Associations Act and the Robinson-Patman Price Discrimination Act sheds no light

on the situation at hand. The Capper-Volstead Act deals with agricultural producers, who by their nature form associations, which, without an exemption, might encroach upon the antitrust laws. See *Maryland & Va. Milk Producers Ass'n.* v. *United States*, 362 U.S. 458 (1960). The Robinson-Patman Act deals directly with antitrust problems.

D. Courts Will Defer Antitrust Questions to Administrative Agencies Without the Necessity of Specific Statutory Provisions.

Plaintiff contends (Brief of Plaintiff, p. 17) that the lower federal courts have refused to defer to administrative agencies for antitrust determinations in the absence of specific congressional authority. However, this conclusion ignores *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963); *Thill Securities Corp.* v. *New York Stock Exchange*, 433 F. 2d 264 (7th Cir., 1970), *cert. denied*, 401 U.S. 994 (1971), and *Kaplan* v. *Lehman Brothers*, 371 F. 2d 409 (7th Cir., 1967), *cert. denied*, 389 U.S. 954 (1967). All of these cases recognized the exemption of the securities exchanges from the antitrust laws notwithstanding the silence of the Securities Exchange Act on the subject.

Plaintiff's citation of *Denver Union Stockyard Co.* v. *Denver Livestock Commission Co.*, 404 F. 2d 1055 (10th Cir., 1968), *cert. denied*, 394 U.S. 1014 (1969), is inapposite because the court held that the Packers and Stockyards Act, 7 U.S.C. §225, specifically states that nothing therein shall create an exemption from the Sherman or Clayton Acts. The fact that stockyards and commodity exchanges are both under the authority of the Secretary

of Agriculture does not make the Packers and Stockyards Act of 1921 and the CEA analogous. Furthermore, the court, in *Denver Union Stockyard*, stated that there is no fixed formula for the application of the doctrine of primary jurisdiction. *Id.* at 1056.

Crain v. *Blue Grass Stockyards Co.*, 399 F. 2d 868 (6th Cir., 1968), cited by plaintiff, also turned on a construction of the Packers and Stockyards Act.

In *Seatrain Lines, Inc.* v. *Federal Maritime Comm'n*, 1972 Trade Reg. Rep. ¶73,898 (D.C. Cir., 1972), the court merely held that a simple sale of assets by one carrier to another is not subject to the jurisdiction of the Federal Maritime Commission (FMC). The case turned on the provisions and legislative history of the Shipping Act, which cannot be said to be analogous to the CEA. Furthermore, the court noted that no record was developed by the FMC detailing its weighing of the antitrust and industry considerations, and that in fifty years, the FMC had not attempted to exercise jurisdiction over this type of matter, which indicated to the court that even the FMC held the view that the FMC did not have jurisdiction.

Though implied in plaintiff's brief (pp. 17-19), *Breen Air Freight, Ltd.* v. *Air Cargo, Inc.*, 1971 Trade Cas. ¶73,775 (S.D. N.Y., 1971), does not set forth the proposition that a court will not recognize primary jurisdiction for antitrust determinations in the absence of specific congressional authority. On the contrary, the court stated at p. 91,273: *"While an express finding of immunity from the anti-trust laws may not be necessary to confer immunity,* the record does not support blanket approval. . . ." (Emphasis added.) The case turned on the

scope of Civil Aeronautics Board (CAB) regulation and the facts of the case.

E. The CEA Is Sufficiently Pervasive to Confer Primary Jurisdiction Upon the CEC.

As our society and the apparatus of government become more complex, so the doctrine of primary jurisdiction evolves beyond its original restrictiveness. This evolution was recognized by this Court in *Silver* v. *New York Stock Exchange,* 373 U.S. 341 (1963). In analyzing the Securities Exchange Act, a statute somewhat analogous to the CEA, this Court stated:

> "Although, as we have seen, the statutory scheme of that Act is not sufficiently pervasive to create a total exemption from the antitrust laws, . . . it is also true that particular instances of exchange self-regulation which fall within the scope and purposes of the Securities Exchange Act may be regarded as justified in answer to the assertion of an antitrust claim." *Id.* at 360-361.

On a parallel plain, it has been stated that the Sherman Act is couched in broad terms, and is adaptable to the changing types of commercial production and distribution which have evolved since its passage. *United States* v. *E. I. DuPont DeNemours & Co.,* 351 U.S. 377, 386 (1956).

Since most of the primary jurisdiction cases have involved problems of regulatory agencies *vis-a-vis* routes and rates, necessarily the law on the subject has been considered and discussed in that limited context. See *United States* v. *Radio Corp. of Am.,* 358 U.S. 334, 348 (1959). However, when the doctrine is applied to a regulatory agency which is not of the nature of the ICC

or the CAB, the language describing the relationship of the doctrine to those latter bodies should not restrict the application of the doctrine to another type of regulatory agency, such as the CEC.

The Secretary of Agriculture and the CEC have as complete and pervasive authority to regulate the operation of their industry as the other agencies. The Secretary of Agriculture has the power to authorize and designate a board of trade as a contract market (7 U.S.C. §7); to receive all bylaws, rules, regulations and resolutions of a contract market (7 U.S.C. §7a(1)); to suspend a contract market for not enforcing its own rules (7 U.S.C. §8(a)); to register traders on a contract market and to order certain traders to desist from trading on a contract market (7 U.S.C. §§9, 12a). Thus the Secretary of Agriculture has the power to control who shall engage in the commodity trading business and has jurisdiction over any violation by a contract market of its own membership rules by virtue of sections 6, 7a(8), 8(a), and 13a.

The difference in the regulatory schemes between the CEA and a more established regulatory act such as the Interstate Commerce Act is one of kind, not one of degree as plaintiff contends. The CEA regulates the various aspects of the framework of the industry, e.g. the exchanges, the member firms, the individual traders. It requires registration and reports for each type of party engaged in the industry. Competition is regulated. The CEC's authority to control its industry and to determine who will compete in its industry as an exchange and as a trader is just as complete as the ICC's. Obviously, the prices of the commodities are not regulated, but this is because the raison d'etre of the commodities industry

is to determine prices by competitive bidding in an orderly way. This necessary "orderly way" is established and sustained by the pervasive regulation of the CEA. See, Comment, *Trade Association Exclusionary Practices: An Affirmative Role for the Rule of Reason*, 66 COLUM. L. REV., 1486, 1492 (1966).

California v. *Federal Power Comm'n*, 369 U.S. 482 (1962), cited by plaintiff, does not even deal with the "pervasive regulatory scheme" question. This Court found that a specific provision of the Clayton Act expressly provided that the Federal Power Commission (FPC) cannot enforce the antitrust laws and that thus the FPC, in a prior administrative ruling, had usurped its powers.[1]

Maryland & Va. Milk Producers Ass'n. v. *United States*, 362 U.S. 458 (1960), also did not touch the "pervasiveness" issue. In this case, an agriculture cooperative was given a statutory antitrust exemption to make agreements to process, handle and market agricultural produce for its producer members, subject to the approval of the Secretary of Agriculture. This Court held that this statute did not thereby grant an antitrust exemption to and confer upon the Secretary of Agriculture jurisdiction over a monopolistic agreement between such a cooperative and another entity involved in another step in the chain of distribution of the produce.

United States v. *Radio Corp. of Am.*, 358 U.S. 334 (1959), also was cited by plaintiff to support his con-

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[1] DAVIS, ADMINISTRATIVE LAW TEXT §19.05 n.8 (3d ed., 1972), states that *California* v. *Federal Power Comm'n* is out of line with the cases in the development of the doctrine of primary jurisdiction and will probably also be out of line with future cases.

tention that a pervasive regulatory scheme is necessary for the invocation of primary jurisdiction. This case involved a Government suit for divestiture after an exchange of television stations which the Federal Communications Commission (FCC) had approved. This Court studied the legislative history of the Communications Act and found that the legislative history specifically stated that the FCC had no authority to pass on antitrust violations as such. *McKeon Construction* v. *McClatchy Newspapers*, 1970 Trade Cas. ¶73,212 (N.D. Cal., 1969), merely followed *R.C.A.*

In *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 352 (1963), this Court found that the legislative history of the Bank Merger Act specifically stated that the "Act would not affect in any way the applicability of the antitrust laws to bank acquisitions." This Court also observed that banking regulation is less complete than public utility regulation. However, banking regulation is not analogous to regulation of the commodities industry. Each bank is a separate unit, doing business independently. On the contrary, the vitality of the commodities industry is closely tied to the exchanges, the limitations of their memberships, and the relationships of the members thereof to each other.

F. The Question of Whether Defendant's Actions Were Arguably Lawful Is Not Reached in This Case.

Plaintiff contends that the defendant's conduct must be "arguably lawful" under the regulatory statute for primary jurisdiction to attach. However, plaintiff fails to set forth the doctrine correctly and then cites cases which do not even support his position.

The arguably lawful doctrine merely provides that if a regulatory agency approved the action of a party, that party can interpose said agency approval as a defense in a subsequent judicial antitrust action. The doctrine only applies when there has been a prior hearing before an agency and subsequently the defendant is subjected to an antitrust suit. However, merely because there never was a prior administrative determination does not mean the defendant has no defense to the antitrust suit and that primary jurisdiction cannot attach. Since there has been no prior administrative hearing in the instant action, defendants never have been able to obtain a determination that their actions were lawful.

Plaintiff's statement that the court below did not find that the defendants' conduct was arguably lawful begs the question. The court held that the complaint states a cause of action under the antitrust laws *prescinding from* the CEA and the doctrine of primary jurisdiction but that whether the complaint, taking those two factors into account, states a cause of action, is a question that the court below held should be answered by the Secretary of Agriculture and/or the CEC.

In *Carnation Co.* v. *Pacific Westbound Conference,* 383 U.S. 213 (1966), this Court merely stated that agreements previously approved by the FMC are, *by statute,* exempt from the antitrust laws, but agreements not approved are not exempt. In the instant case, because plaintiff failed to follow CME Rule 500, defendants never had an opportunity to determine if their actions were legal.

The citation of *Allied Air Freight, Inc.* v. *Pan American World Airways, Inc.,* 393 F. 2d 441 (2d Cir., 1968),

cert. denied, 393 U.S. 846 (1968), also is inapposite. Defendants entered into a monopolistic agreement which had not been filed with or approved by the CAB. The court held that defendants therefore could not argue that the agreement was arguably lawful and the court refused to grant primary jurisdiction to the CAB.

Marnell v. *United Parcel Service of Am., Inc.,* 260 F. Supp. 391 (N.D. Cal., 1966), is directly in support of defendants' position. The very reason the Court of Appeals below remanded this case to the Secretary of Agriculture is because "the conduct in question might be exempt from the antitrust laws by the regulatory agency under some express or plainly implied provision of the regulatory act." *Id.* at 412. In *Marnell,* the court held that defendants did not receive permission from the state commerce commission to commit the monopolistic acts they committed, and that the state commerce commission and the ICC had no jurisdiction over those types of acts.

In *Breen Air Freight, Ltd.* v. *Air Cargo, Inc.,* 1971 Trade Cas. ¶73,775 (S.D. N.Y., 1971), the court held that the CAB did not have jurisdiction to decide the question involved.

G. The CEC Has the Power to Hear the Case.

1. Plaintiff can file a complaint with the CEC.

2. The CEC's inability to award damages does not deprive it of primary jurisdiction.

Plaintiff's contention that he is without right to appear before the administrative agency is without merit when considered in the light of 17 C.F.R. §§0.3 and 0.53, which provide that "any interested person having any information of any violation of the act . . . may file . . . an ap-

plication requesting the institution" of proceedings before the Secretary or the Commission. To term the Commission as impotent because it has the discretion to exclude him is a contradiction in terms. If the Commission excludes him improperly, plaintiff can always appeal. Plaintiff's argument is similar to an argument that a court has no jurisdiction over a party's case since it might hold against the party.

It is clearly established that an agency's lack of power to award damages does not prevent the application of the doctrine of primary jurisdiction. If that were the case, the doctrine never would have taken root and developed. *Pan American World Airways, Inc.* v. *United States,* 371 U.S. 296, 311-312 (1963), recognized that the

> "[Civil Aeronautics] Board has no power to award damages or to bring criminal prosecutions. Nor does it, as already noted, have jurisdiction over every antitrust violation by air carriers. But where the problem lies within the purview of the Board, as do questions of division of territories, the allocation of routes, and the affiliation of common carriers with air carriers, *Congress must have intended to give it authority that was ample to deal with the evil at hand.*" (Emphasis added.)

In *General Am. Tank Car Corp.* v. *El Dorado Terminal Co.,* 308 U.S. 422, 433 (1940), a suit for breach of contract was referred to the ICC, which had no jurisdiction to grant damages. This Court said:

> "When it appeared in the course of the litigation that an administrative problem, committed to the Commission, was involved, the court should have stayed its hand pending the Commission's determination of the lawfulness and reasonableness of the practices under the terms of the act."

See also *Thompson* v. *Texas M. Ry.,* 328 U.S. 134 (1946).

It is implicit in the cases cited by plaintiff that the courts first grappled with the dispositive question of whether there was partial antitrust immunity and decided this question in the negative. Then the courts went on to say that since the agency had no power to grant the damages to which the courts found the plaintiff was entitled, primary jurisdiction did not lie. On the other hand, if there be partial antitrust immunity, as there is in this case, the plaintiff is not entitled to treble damages and the question of the agency's power to award them is not reached.

For example, in *Allied Air Freight, Inc.* v. *Pan American World Airways, Inc.*, 393 F. 2d 441 (2d Cir., 1968), *cert. denied*, 393 U.S. 846 (1968), cited by plaintiff, the court held that plaintiff did not have to exhaust his administrative remedies before an administrative agency which had no power to grant the relief sought, since the alleged anticompetitive agreement did not have CAB approval and thus was not exempt from the antitrust laws. On the contrary, in the instant matter, the CEC has jurisdiction over the parties, plaintiff has an opportunity to have a CEC hearing, and the activity is potentially exempt from the antitrust laws under sections 8(a), 13a, and 13c(b) of the CEA and the doctrine of the *Silver* case.

Trans World Airlines, Inc. v. *Hughes*, 214 F. Supp. 106 (S.D. N.Y., 1963), *aff'd*, 332 F. 2d 602 (2d Cir., 1964), *petition for cert. dismissed*, 380 U.S. 249 (1965), dealt with a statute that declares it unlawful without CAB approval for anyone engaged in a phase of aeronautics to acquire control of an air carrier, and that with such CAB approval the acquisition is exempt from the antitrust

laws. Defendant was a manufacturer of aircraft. Pursuant to CAB approval, it acquired control of TWA. Subsequently defendant committed antitrust violations by economically coercing TWA to purchase only defendant's aircraft. The court held that these acts were not the types of acts over which the CAB had primary jurisdiction; that the CAB only had jurisdiction over the acquisition itself, "rather than the broad range of activities into which the controller may enter thereafter." 332 F. 2d at 608. After the acquisition, the CAB retains jurisdiction over the air carrier, but not over the company that owns controlling stock in the air carrier. The court's statement that the Board is unable to grant damages is a non sequitur and *dicta*. Under the proper set of facts, as in the instant case, this inability should not preclude primary jurisdiction.

In *Breen Air Freight, Ltd.* v. *Air Cargo, Inc.*, 1971 Trade Cas. ¶73,775 (S.D. N.Y., 1971), defendant was a freight forwarding company owned by seventeen certified air carriers. Defendant had hired plaintiffs to handle its freight and then discharged plaintiffs and hired its own subsidiary. Defendant had been established with CAB approval, but its subsidiary had not. The court held at 91,273:

> "While an express finding of immunity from the antitrust laws may not be necessary to confer immunity, the record does not support blanket approval or continued surveillance of the activities of Air Cargo, Inc. itself acting on its own—to be distinguished from broader, over-all scrutiny of such conceded areas of traditional C. A. B. expertise as tariffs."

The court followed the reasoning of *TWA. Denver Petroleum Corp.* v. *Shell Oil Co.*, 306 F. Supp. 289 (D. Colo., 1969), did not involve the agency power to award

damages, but merely found that under the Mineral Lands Leasing Act the agency had no power to exempt crude oil pipelines from the obligations under the Act.

III.

ANSWER TO THE GOVERNMENT'S ARGUMENTS.

A. The Regulatory Scheme of the CEA Is Sufficiently Pervasive.

B. Antitrust Immunity Arises from the CEA and the Silver Case.

C. The CEC Has the Power to Grant Effective Relief.

D. The CEC Has the Expertise Sufficient for the Application of Primary Jurisdiction.

E. The CEC Has a Procedure Sufficient to Hear This Case.

The Government attempts to establish that the CEA's regulatory scheme is not pervasive by comparing the Act to the shipping, transportation and aeronautics cases. (Brief of Government, p. 22). Merely because the regulatory schemes in the latter cases are more detailed does not mean that they are more pervasive. The commodities industry is regulated to the extent necessary to regulate the industry and to protect the public. Contrary to the contention of the Government (Brief of Government, p. 24), entry into the industry is controlled by statute and rules. Commission merchants, brokers, and floor traders, 7 U.S.C. §§6e and 12a, 17 C.F.R. §§1.7 and 1.8; and exchanges, 7 U.S.C. §7 and 17 C.F.R. §1.41, must register with the Secretary and are subject to revocation of registration for violation of the rules. 7 U.S.C. §§ 7b, 8, and 9.

The immunity from the antitrust laws arises both from the statute, 7 U.S.C. §§8(a), 13a, and 13c(b) and from the case law. *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963). (See discussion, pp. 11-16, *supra*.)

The power of the Secretary and/or CEC to grant effective relief against conduct which violates antitrust policies is discussed at pp. 28-32, *supra*.

The Government's citation of the proposed bill to confer jurisdiction of the Secretary over a person who has restrained trade in connection with the sale of any commodity (Brief of Government, p. 24, n.12) is inapposite. In the instant case, the alleged restraint was not on the sale of a commodity future. As in the *Silver* case, where the restraint was not on the trading of a particular security, the restraint was on plaintiff's business. The regulatory scheme of the CEA, coupled with the reasoning of *Silver*, clearly places the restraint on plaintiff's business within the jurisdiction of the CEC.

The issue of the relationship of 7 U.S.C. §13c(b) to the antitrust laws is discussed at p. 18, *supra*.

Clearly the CEC has greater familiarity and experience with the provisions of the CEA, the rules of CEC, the rules of the CME, and the procedures in the industry than the courts and would be helpful to the court's ultimate decision. In *Silver*, this court stated at 362-363:

> "Provision of such a hearing will, moreover, contribute to the effective functioning of the antitrust court, which would be severely impeded in providing the review of exchange action which we deem essential if the exchange could obscure rather than illuminate the circumstances under which it has acted. Hence the affording of procedural safeguards not only will substantively encourage the lessening of

> anticompetitive behavior outlawed by the Sherman Act but will allow the antitrust court to perform its function effectively."

Whether or not the agency happens to be an expert, a court normally should not act upon subject matter that is peculiarly within the agency's specialized field without taking into account what the agency has to offer, for otherwise parties who are subject to the agency's continuous regulation may become victims of uncoordinated and conflicting requirements. *Far East Conference* v. *United States,* 342 U.S. 570, 574-575 (1952); DAVIS, ADMINISTRATIVE LAW TEXT, §19.01 at 374 (3d ed. 1972).

Particularly with regard to a statute such as the CEA, which is not often the subject of litigation, and sections 8(a), 13a, and 13c(b), which were added in 1968 and about which there is a paucity of legislative history, it would be helpful to the court if the CEC could express its opinions on their scope and meaning. *Federal Maritime Bd.* v. *Isbrandtsen Co.,* 356 U.S. 481, 498-499 (1958).

By citing *Far East Conference* v. *United States,* 342 U.S. 570, 574, and *United States* v. *Western Pac. R.R.,* 352 U.S. 59, 64-65 (1956), the Government tries to limit the application of the doctrine of primary jurisdiction to transportation cases. *Local Union No. 189* v. *Jewel Tea Co.,* 381 U.S. 676 (1965); *Vaca* v. *Sipes,* 386 U.S. 171, 176-188 (1967); *Carey* v. *Westinghouse Electric Corp.,* 375 U.S. 261 (1964); and *Smith* v. *Evening News Ass'n.,* 371 U.S. 195 (1962), were controlled by a statute which expressly precluded primary jurisdiction. *J. I. Case Co.* v. *Borak,* 377 U.S. 426 (1964), hinged on an interpretation of the Securities Exchange Act in a stockholder's derivative suit and is not in point.

Contrary to the Government's position, the denial of primary jurisdiction could interfere with the regulatory scheme since the CEC has jurisdiction over the enforcement of the CME's rules by virtue of 7 U.S.C. §§8(a) and 13a. These sections expressly grant the CEC power which this Court correctly observed in *Silver* that the SEC lacked: "[J]urisdiction to review particular instances of enforcement of exchange rules." 373 U.S. at 357.

The Government contends that the CEC is obliged only to oversee enforcement of exchange rules relating to "trading requirements" and that plaintiff's cause of action does not relate to trading requirements.

However, as the Court of Appeals below stated, "Membership in a contract market is a prerequisite to lawful trading in commodities futures. Title 7, U.S.C.A. §6. Therefore, Rule 307, allegedly violated in the transfer of appellant's membership, and Rule 322, allegedly violated in the attempt to cancel appellant's authorization to trade, both relate to 'trading requirements.'" (A. 41).

CONCLUSION.

For the foregoing reasons, Respondents, The Siegel Trading Co., Inc., and Joseph E. Siegel, respectfully pray that the judgment of the Court of Appeals remanding this action to the District Court with directions to stay the proceedings until such time as the Commodity Exchange Commission and/or the Secretary of Agriculture may act upon it be affirmed.

Respectfully submitted,

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ADDENDUM

CLAYTON ACT, §4, 15 U.S.C. §15

§15. Suits by persons injured; amount of recovery

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. Oct. 15, 1914, c. 323, § 4, 38 Stat. 731.

COMMODITY EXCHANGE ACT, 7 U.S.C. §§1-17b,

provides *inter alia* as follows:

§6. Prohibition against dealings in commodity futures; exceptions

It shall be unlawful for any person to deliver for transmission through the mails or in interstate commerce by telegraph, telephone, wireless, or other means of communication any offer to make or execute, or any confirmation of the execution of, or any quotation or report of the price of, any contract of sale of commodity for future delivery on or subject to the rules of any board of trade in the United States, or for any person to make or execute such contract of sale, which is or may be used for (a) hedging any transaction in interstate commerce in commodity or the products or by-products thereof, or (b) determining the price basis of any such transaction in interstate commerce, or (c) delivering commodity sold, shipped, or re-

ceived in interstate commerce for the fulfillment thereof, except, in any of the foregoing cases, where such contract is made by or through a member of a board of trade which has been designated by the Secretary of Agriculture as a "contract market," as hereinafter provided in this chapter, and if such contract is evidenced by a record in writing which shows the date, the parties to such contract and their addresses, the property covered and its price, and the terms of delivery; *Provided,* That each board member shall keep such record for a period of three years from the date thereof, or for a longer period if the Secretary of Agriculture shall so direct, which record shall at all times be open to the inspection of any representative of the United States Department of Agriculture or the United States Department of Justice. (Sept. 21, 1922, ch. 369, § 4, 42 Stat. 999; June 15, 1936, ch. 545, §§ 2, 4, 49 Stat. 1491, 1492.)

§6d. Futures commission merchants, dealing by unregistered merchants prohibited; moneys and securities of customers, care and use

It shall be unlawful for any person to engage as futures commission merchant in soliciting orders or accepting orders for the purchase or sale of any commodity for future delivery, or involving any contracts of sale of any commodity for future delivery, on or subject to the rules of any contract market unless—

(1) such person shall have registered, under this chapter, with the Secretary of Agriculture as such futures commission merchant and such registration shall not have expired nor been suspended nor revoked; and

(2) such person shall, whether a member or non-member of a contract market, treat and deal with all money, securities, and property received by such person to margin, guarantee, or secure the trades or contracts of any customer of such person, or accruing to such customer as the result of such trades or contracts, as belonging to such customer. * * * * (Sept. 21, 1922, ch. 369, § 4d, as added June 15, 1936, ch. 545, § 5, 49 Stat. 1494, and amended Feb. 19, 1968, Pub. L. 90-258, § 6, 82 Stat. 27.)

§6e. Floor brokers; dealings by unregistered broker prohibited

It shall be unlawful for any person to act as floor broker in executing any orders for the purchase or sale of any commodity for future delivery, or involving any contracts of sale of any commodity for future delivery, on or subject to the rules of any contract market unless such person shall have registered, under this chapter, with the Secretary of Agriculture as such floor broker and such registration shall not have expired nor been suspended nor revoked. (Sept. 21, 1922, ch. 369, § 4e, as added June 15, 1936, ch. 545, § 5, 49 Stat. 1945.)

§7. Designation of board of trade as "contract market"; conditions and requirements

The Secretary of Agriculture is hereby authorized and directed to designate any board of trade as a "contract market" when, and only when, such board of trade complies with and carries out the following conditions and requirements:

(a) When located at a terminal market where any cash commodity of the kind specified in the contracts of sale of commodity for future delivery to be executed on such board is sold in sufficient volumes and under such conditions as fairly to reflect the general value of the commodity and the differences in value between the various grades of such commodity, and where there is available to such board of trade, official inspection service approved by the Secretary of Agriculture for the purpose: *Provided,* That any board of trade not so located shall be designated as a "contract market" if such board of trade provides for the delivery of commodities on such contracts at a delivery point or points and upon terms and conditions approved by the Secretary of Agriculture.

(b) When the governing board thereof provides for the making and filing by the board or any member thereof, as the Secretary of Agriculture may direct, of reports in accordance with the rules and regulations, and in such manner and form and at such times as may be prescribed by the Secretary of Agriculture, showing the details and terms of all transactions entered into by the board, or the members thereof, either in cash transactions or transactions for future delivery consummated on or subject to the rules of a board of trade, or transactions for future delivery, and when such governing board provides, in accordance with such rules and regulations, for the keeping of a record by the board or the members of the board of trade, as the Secretary of Agriculture may direct, showing the details and terms of all cash and future transactions entered into by them, consummated on or subject to the rules of a board of trade, such record to be in permanent form, showing the parties to all such transactions, including the persons for whom made, any assignments or transfers thereof, with the parties thereto, and the manner in which said trans-

actions are fulfilled, discharged, or terminated. Such record shall be required to be kept for a period of three years from the date thereof, or for a longer period if the Secretary of Agriculture shall so direct, and shall at all times be open to the inspection of any representative of the United States Department of Agriculture or United States Department of Justice.

(c) When the governing board thereof provides for the prevention of dissemination by the board or any member thereof of false or misleading or knowingly inaccurate reports concerning crop or market information or conditions that affect or tend to affect the price of commodity in interstate commerce.

(d) When the governing board thereof provides for the prevention of manipulation of prices and the cornering of any commodity by the dealers or operators upon such board.

(e) When the governing board thereof does not exclude from membership in and all privileges on such board of trade any duly authorized representative of any lawfully formed and conducted cooperative association of producers having adequate financial responsibility which is engaged in any cash commodity business, if such association has complied, and agrees to comply, with such terms and conditions as are or may be imposed lawfully on other members of such board: *Provided,* That no rule of a contract market shall forbid or be construed to forbid the return on a patronage basis by such cooperative association to its bona fide members of moneys collected in excess of the expense of conducting the business of such association.

(f) When the governing board provides for making effective the final orders or decisions entered pursuant to

the provisions of section 9 of this title, and the orders issued pursuant to the provisions of section 7a of this title, and for compliance in all other respects with the requirements applicable to such board of trade under this chapter. (Sept. 21, 1922, ch. 369, § 5, 42 Stat. 1000; June 15, 1936, ch. 545, §§ 2, 6, 49 Stat. 1491, 1497; Feb. 19, 1968, Pub. L. 90-258, §§ 10, 11, 82 Stat. 29.)

§7a. **Duties of contract markets**

Each contract market shall—

By-laws, rules, etc.; furnishing copies to Secretary

(1) Promptly furnish the Secretary of Agriculture copies of all bylaws, rules, regulations, and resolutions made or issued by it or by the governing board thereof or any committee, and of all changes and proposed changes therein;

Access for inspection of books and records

(2) Allow inspection at all times by any authorized representative of the United States Department of Agriculture or United States Department of Justice of the books, records, and all minutes and journals of proceedings of such contract market, its governing board and all committees, and of all subsidiaries and affiliates of such contract market, which books, records, minutes, and journals of proceedings shall be kept for a period of three years from the date thereof, or for a longer period if the Secretary of Agriculture shall so direct;

* * * *

Enforcement of bylaws, etc., relating to trading requirements

(8) Enforce all bylaws, rules, regulations, and resolutions, made or issued by it or by the governing board there-

of or any committee, which relate to terms and conditions in contracts of sale to be executed on or subject to the rules of such contract market or relate to other trading requirements, and which have not been disapproved by the Secretary of Agriculture pursuant to paragraph (7) of section 12a of this title; and revoke and not enforce any such bylaw, rule, regulation, or resolution, made, issued, or proposed by it or by the governing board thereof or any committee, which has been so disapproved; and

Enforcement of bylaws, etc., providing minimum financial standards and related reporting requirements

(9) Enforce all bylaws, rules, regulations, and resolutions made or issued by it or by the governing board thereof or by any committee, which provide minimum financial standards and related reporting requirements for futures commission merchants who are members of such contract market, and which have been approved by the Secretary of Agriculture. (Sept. 21, 1922, ch. 369, § 5a, as added June 15, 1936, ch. 545, § 7, 49 Stat. 1497, and amended Feb. 19, 1968, Pub. L. 90-258, § 12, 82 Stat. 29.)

§7b. Suspension or revocation of designation as "contract market"

The failure or refusal of any board of trade to comply with any of the provisions of this chapter, or any of the rules, regulations, or orders of the Secretary of Agriculture or the commission thereunder, shall be cause for suspending for a period not to exceed six months or revoking the designation of such board of trade as a "contract market" in accordance with the procedure and subject to the judicial review provided in section 8 of this title. (Sept. 21, 1922, ch. 369, § 5b, as added June 15, 1936, ch. 545, § 7, 49 Stat. 1498, and amended Feb. 19, 1968, Pub. L. 90-258, § 13, 82 Stat. 30.)

§8. Application for designation as "contract market"; suspension or revocation of designation; hearing; review by court of appeals

Any board of trade desiring to be designated a "contract market" shall make application to the Secretary of Agriculture for such designation and accompany the same with a showing that it complies with the conditions of section 7 of this title, and with a sufficient assurance that it will continue to comply with the requirements of such section 7. In the event of a refusal to designate as a "contract market" any board of trade that has made application therefor, such board of trade shall be afforded an opportunity for a hearing before the commission, with the right to appeal an adverse decision after such hearing to the court of appeals as provided for in other cases in paragraph (a) of this section.

(a) The commission is authorized to suspend for a period not to exceed six months or to revoke the designation of any board of trade as a "contract market" upon a showing that such board of trade is not enforcing or has not enforced its rules of government made a condition of its designation as set forth in section 7 of this title or that such board of trade, or any director, officer, agent, or employee thereof, otherwise is violating or has violated any of the provisions of this chapter or any of the rules, regulations, or orders of the Secretary of Agriculture or the commission thereunder. Such suspension or revocation shall only be after a notice to the officers of the board of trade affected and upon a hearing: *Provided,* That such suspension or revocation shall be final and conclusive, unless within fifteen days after such suspension or revocation by the commission such board of trade appeals to the court

of appeals for the circuit in which it has its principal place of business, by filing with the clerk of such court a written petition praying that the order of the commission be set aside or modified in the manner stated in the petition, together with a bond in such sum as the court may determine, conditioned that such board of trade will pay the costs of the proceedings if the court so directs. The clerk of the court in which such a petition is filed shall immediately cause a copy thereof to be delivered to the Secretary of Agriculture, who shall thereupon notify the other members of the commission and file in the court the record in such proceedings, as provided in section 2112 of Title 28. The testimony and evidence taken or submitted before the commission, duly filed as aforesaid as a part of the record, shall be considered by the court of appeals as the evidence in the case. The proceedings in such cases in the court of appeals shall be made a preferred cause and shall be expedited in every way. Such a court may affirm or set aside the order of the commission or may direct it to modify its order. No such order of the commission shall be modified or set aside by the court of appeals unless it is shown by the board of trade that the order is unsupported by the weight of the evidence or was issued without due notice and a reasonable opportunity having been afforded to such board of trade for a hearing, or infringes the Constitution of the United States, or is beyond the jurisdiction of the commission. (Sept. 21, 1922, ch. 369, § 6(a), 42 Stat. 1001; June 25, 1948, ch. 646, § 32(a), 62 Stat. 991; May 24, 1949, ch. 139, § 127, 63 Stat. 107; Aug. 28, 1958, Pub. L. 85-791, § 7(a), 72 Stat. 944; Feb. 19, 1968, Pub. L. 90-258, §§ 14, 15, 82 Stat. 30.)

§9. Exclusion of persons from privilege of "contract markets"; procedure for exclusion; review by court of appeals

If the Secretary of Agriculture has reason to believe that any person (other than a contract market) is manipulating or attempting to manipulate or has manipulated or attempted to manipulate the market price of any commodity, in interstate commerce, or for future delivery on or subject to the rules of any contract market, or has willfully made any false or misleading statement of a material fact in any registration application or any report filed with the Secretary of Agriculture under this chapter, or willfully omitted to state in any such application or report any material fact which is required to be stated therein, or otherwise is violating or has violated any of the provisions of this chapter or of the rules, regulations, or orders of the Secretary of Agriculture or the commission thereunder, he may serve upon such person a complaint stating his charges in that respect, which complaint shall have attached or shall contain therein a notice of hearing, specifying a day and place not less than three days after the service thereof, requiring such person to show cause why an order should not be made prohibiting him from trading on or subject to the rules of any contract market, and directing that all contract markets refuse all trading privileges to such person, until further notice of the Secretary of Agriculture, and to show cause why the registration of such person, if registered as futures commission merchant or as floor broker hereunder, should not be suspended or revoked. Said hearing may be held in Washington, District of Columbia, or elsewhere, before the Secretary of Agriculture, or before a referee designated by the Secretary of Agriculture, which referee shall cause all evidence to be reduced to writing and forthwith transmit the same to

the Secretary of Agriculture. Upon evidence received, the Secretary of Agriculture may prohibit such person from trading on or subject to the rules of any contract market and require all contract markets to refuse such person all trading privileges thereon for such period as may be specified in the order, and, if such person is registered as futures commission merchant or as floor broker hereunder, may suspend, for a period not to exceed six months, or revoke, the registration of such person. Notice of such order shall be sent forthwith by registered mail or by certified mail or delivered to the offending person and to the governing boards of said contract markets. After the issuance of the order by the Secretary of Agriculture, the person against whom it is issued may obtain a review of such order or such other equitable relief as to the court may seem just by filing in the United States court of appeals of the circuit in which the petitioner is doing business a written petition praying that the order of the Secretary of Agriculture be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Secretary of Agriculture and thereupon the Secretary of Agriculture shall file in the court the record theretofore made, as provided in section 2112 of Title 28. Upon the filing of the petition the court shall have jurisdiction to affirm, to set aside, or modify the order of the Secretary of Agriculture, and the findings of the Secretary of Agriculture as to the facts, if supported by the weight of evidence, shall in like manner be conclusive. (Sept. 21, 1922, ch. 369, § 6(b), 42 Stat. 1001; June 15, 1936, ch. 545, § 8(a)—(d), (h)—(j), 49 Stat. 1498, 1499; June 25, 1948, ch. 646, § 32(a), 62 Stat. 991; May 24, 1949, ch. 139, § 127, 63 Stat. 107; Aug. 28, 1958, Pub. L. 85-791, § 7(b), 72 Stat. 944; June 11, 1960, Pub. L. 86-507, § 1(2), 74 Stat. 200; Feb. 19, 1968, Pub. L. 90-258, § 16, 82 Stat. 30.)

§12a. Registration of commission merchants and brokers; fees; rules and regulations; publication of harmful acts

The Secretary of Agriculture is authorized—

(1) to register futures commission merchants and floor brokers upon application in accordance with rules and regulations and in form and manner to be prescribed by the Secretary of Agriculture; and

(2) to refuse to register any person— • • • •

(7) to disapprove any bylaw, rule, regulation, or resolution made, issued or proposed by a contract market or by the governing board thereof or any committee which relates to terms and conditions in contracts of sale to be executed on or subject to the rules of such contract market or relates to other trading requirements, when he finds that such bylaw, rule, regulation, or resolution violates or will violate any of the provisions of this chapter, or any of the rules, regulations, or orders of the Secretary of Agriculture or the commission thereunder. (Sept. 21, 1922, ch. 369, § 8a, as added June 15, 1936, ch. 545, § 10, 49 Stat. 1500, and amended Aug. 5, 1955, ch. 574, 69 Stat. 535; Feb. 19, 1968, Pub. L. 90-258, §§ 20-23, 82 Stat. 32, 33.)

§13a. Nonenforcement of rules of government or other violations, cease and desist orders against contract markets; punishment; misdemeanor; separate offenses

If any contract market is not enforcing or has not enforced its rules of government made a condition of its designation as set forth in section 7 of this title, or if any contract market, or any director, officer, agent, or employee of any contract market otherwise is violating or has vio-

lated any of the provisions of this chapter or any of the rules, regulations, or orders of the Secretary of Agriculture or the commission thereunder, the commission may, upon notice and hearing and subject to appeal as in other cases provided for in paragraph (a) of section 8 of this title, make and enter an order directing that such contract market, director, officer, agent, or employee shall cease and desist from such violation, and if such contract market, director, officer, agent, or employee thereafter and after the lapse of the period allowed for appeal of such order or after the affirmance of such order, shall fail or refuse to obey or comply with such order, such contract market, director, officer, agent, or employee shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than $500 nor more than $10,000 or imprisoned for not less than six months nor more than one year, or both. Each day during which such failure or refusal to obey such order continues shall be deemed a separate offense.

(Sept. 21, 1922, ch. 369, § 6b, as added June 15, 1936, ch. 545, § 9, 49 Stat. 1500, and amended Feb. 19, 1968, Pub. L. 90-258, § 18, 82 Stat. 31.)

§13b. **Manipulations or other violations; cease and desist orders against persons other than contract markets; punishment; misdemeanor or felony; separate offenses**

If any person (other than a contract market) is manipulating or attempting to manipulate or has manipulated or attempted to manipulate the market price of any commodity, in interstate commerce, or for future delivery on or subject to the rules of any contract market, or otherwise is violating or has violated any of the provisions of this chapter or of the rules, regulations, or orders of the Secretary of Agriculture or the commission thereunder, the Sec-

retary may, upon notice and hearing, and subject to appeal as in other cases provided for in section 9 of this title, make and enter an order directing that such person shall cease and desist therefrom and, if such person thereafter and after the lapse of the period allowed for appeal of such order or after the affirmance of such order, shall fail or refuse to obey or comply with such order, such person shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than $500 nor more than $10,000, or imprisoned for not less than six months nor more than one year, or both, except that if such failure or refusal to obey or comply with such order involves any offense within paragraph (a) or (b) of section 13 of this title, such person shall be guilty of a felony and, upon conviction thereof, shall be subject to the penalties of said paragraph (a) or (b): *Provided,* That any such cease and desist order against any respondent in any case of manipulation of, or attempt to manipulate, the price of any commodity shall be issued only in conjunction with an order issued against such respondent under section 9 of this title. Each day during which such failure or refusal to obey or comply with such order continues shall be deemed a separate offense.

(Sept. 21, 1922, ch. 369, § 6(c), as added Feb. 19, 1968, Pub. L. 90-258, § 17, 82 Stat. 31.)

§13c. Responsibility as principal; minor violations

(a) Any person who commits, or who willfully aids, abets, counsels, commands, induces, or procures the commission of, a violation of any of the provisions of this chapter, or any of the rules, regulations, or orders issued pursuant to this chapter, or who acts in combination or concert with any other person in any such violation, or who willfully causes an act to be done or omitted which if direct-

ly performed or omitted by him or another would be a violation of the provisions of this chapter or any of such rules, regulations, or orders may be held responsible in administrative proceedings under this chapter for such violation as a principal.

(b) Nothing in this chapter shall be construed as requiring the Secretary of Agriculture or the commission to report minor violations of this chapter for prosecution, whenever it appears that the public interest does not require such action.

(Sept. 21, 1922, ch. 369, § 13, as added Feb. 19, 1968, Pub. L. 90-258, § 26, 82 Stat. 34.)

TITLE 17 C.F.R.

Part 0—Rules of Practice

Subpart A—Rules Applicable to Proceedings Before the Secretary of Agriculture

Rules Applicable to Disciplinary Proceedings

§0.3 Institution of proceedings.

(a) *Application to institute proceeding.* Any interested person having any information of any violation of the act, or of any of the regulations promulgated thereunder, by any person (other than a contract market) may file with the Act Administrator an application requesting the institution of such proceeding as is authorized under the act. Such application shall be in writing, signed by or on behalf of the applicant, and shall include a short and simple statement of the facts constituting the alleged violation and the name and address of the applicant and the name and address of the person against whom the applicant complains.

(b) *Status of applicant.* The person filing an application as described in paragraph (a) of this section shall have no legal status in the proceeding which may be instituted as a result of the application, except where the applicant may be permitted to intervene therein, in the manner provided in this subpart, or may be called as a witness, and the applicant's identity shall not be divulged by any employee of the Department, except with the applicant's prior consent or upon court order.

(c) *Who may institute.* If, after investigation of the matters complained of in the application described in paragraph (a) of this section, or after investigation made on his own motion, the Secretary "has reason to believe that any person (other than a contract market) is violating or has violated any of the provisions of the act, or any of the rules and regulations made pursuant to its requirements, or has manipulated or is attempting to manipulate the market price of any commodity, in interstate commerce, or for future delivery on or subject to the rules of any board of trade,"[1] he will institute a proceeding: *Provided*, That in any case, except one of wilfulness or one in which the public health, interest or safety otherwise requires, prior to the institution of a proceeding for the suspension or revocation of a registration or license, facts or conditions which may warrant such action shall be called, in writing, to the attention of the person complained against, and such person shall be accorded opportunity to demonstrate or achieve compliance with all lawful requirements. Proceedings will be instituted only upon complaints issued

[1] Words in quotation marks from sec. 6(b), 42 Stat. 1001, as amended; 7 U.S.C. 15.

by the Secretary and will not be instituted upon pleadings filed by private persons.

§0.8 Intervention.

At any time after the institution of a proceeding, and before it has been submitted to the Secretary for final consideration, the Secretary or the referee may, upon petition in writing and for good cause shown, permit any person to intervene therein. The petition shall state with preciseness and particularity: (a) The petitioner's relationship to the matters involved in the proceeding, (b) the nature of the material he intends to present in evidence, (c) the nature of the argument he intends to make, (d) any other reason that he should be allowed to intervene.

Subpart B—Rules Applicable to Proceedings Before the Commodity Exchange Commission

Rules Applicable to Disciplinary Proceedings

§0.53 Institution of proceedings.

(a) *Application to institute proceedings.* Any interested person having any information of any violation of the act, or of any of the orders or regulations promulgated thereunder, by any board of trade or by any director, officer, agent, or employee thereof may file with the Act Administrator an application requesting the institution of such proceeding as is authorized under the act. Such application shall be in writing, signed by or on behalf of the applicant, and shall include a short and simple statement of the facts constituting the alleged violation and the name and address of the applicant and the name and address of the person against whom the applicant complains.

(b) *Status of applicant.* The person filing an application as described in paragraph (a) of this section shall have no legal status in the proceeding which may be instituted as a result of the application, except where the applicant may be permitted to intervene therein, in the manner provided in this subpart, or may be called as a witness, and the applicant's identity shall not be divulged by any employee of the Department, except with the applicant's prior consent or upon court order.

(c) *Who may institute.* If, after investigation of the matters complained of in the application described in paragraph (a) of this section, or after investigation made on its own motion, the Commission has reason to believe that any board of trade or any director, officer, agent, or employee thereof has violated or is violating any of the provisions of the act, or of any of the regulations promulgated thereunder, the Commission will institute an appropriate proceeding: *Provided,* That in any case, except one of willfullness or one in which the public health, interest or safety otherwise requires, prior to the institution of a proceeding for the suspension or revocation of any designation of a contract market, facts or conditions which may warrant such action shall be called to the attention of the market in writing and such market shall be accorded opportunity to demonstrate or achieve compliance with all lawful requirements. Proceedings will be instituted only upon complaints issued by the Commission and will not be instituted upon pleadings filed by private persons.

§0.58 Intervention.

At any time after the institution of a proceeding, and before it has been submitted to the Commission for final

consideration, the Commission or the referee may, upon petition in writing and for good cause shown, permit any person to intervene therein. The petition shall state with preciseness and particularity: (a) The petitioner's relationship to the matters involved in the proceeding, (b) the nature of the material he intends to present in evidence, (c) the nature of the argument he intends to make, (d) any other reason that he should be allowed to intervene.

Part 1—General Regulations Under the Commodity Exchange Act

Registration of Futures Commission Merchants and Floor Brokers

§1.7 Registration required of futures commission merchants.

No person shall engage as futures commission merchant in the solicitation or acceptance of orders for the purchase or sale of any commodity for future delivery, or involving any contracts of sale of any commodity for future delivery, on or subject to the rules of any contract market, unless the Secretary of Agriculture has registered such person as futures commission merchant under the Commodity Exchange Act and such registration has not expired and is not under suspension or revocation.

[36 F.R. 22810, Dec. 1, 1971]

§1.8 Registration required of floor brokers.

No person shall act as floor broker in executing any orders for the purchase or sale of any commodity for future delivery, or involving any contracts of sale of any commodity for future delivery, on or subject to the rules of any contract market unless such person shall have been register-

ed as floor broker under the Commodity Exchange Act by the Secretary of Agriculture and such registration shall not have expired, been suspended, or been revoked.

[33 F.R. 14454, Sept. 26, 1968]

Miscellaneous

§1.41 Contract market rules, regulations; filing of copies.

Each contract market shall promptly furnish to the Commodity Exchange Authority copies of all bylaws, rules, regulations, and resolutions made or issued by it or by the governing board thereof, or by any committee or clearing organization thereof, and of all changes and proposed changes therein, and shall notify the Commodity Exchange Authority promptly of all changes in its membership. Three copies of all such material shall be furnished to the Act Administrator, Commodity Exchange Authority, U.S. Department of Agriculture, Washington, D.C. 20250, and one copy shall be furnished to the director of the regional office of the Commodity Exchange Authority having local jurisdiction with respect to such contract market.

(Sec. 8a, as amended by secs. 20-23, 82 Stat. 32, 33; 7 U.S.C. 12a, 1964 ed., Supp. IV 1969) [35 F.R. 11018, July 9, 1970]

SHERMAN ACT, §1, 15 U.S.C. §1

§1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: * * * *

No. 71-858

SEP 23 1972

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1971

THOMAS RICCI,

Petitioner,

vs.

CHICAGO MERCANTILE EXCHANGE, an Illinois not-for-profit corporation, EVERETTE B. HARRIS, WILLIAM PHELAN, LEO MELAMED, THE SIEGAL TRADING COMPANY, a corporation, and JOSEPH E. SIEGAL,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

PETITIONER'S REPLY BRIEF

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-858

THOMAS RICCI,

Petitioner,

vs.

CHICAGO MERCANTILE EXCHANGE, an Illinois not-for-profit corporation, EVERETTE B. HARRIS, WILLIAM PHELAN, LEO MELAMED, THE SIEGAL TRADING COMPANY, a corporation, and JOSEPH E. SIEGAL,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

PETITIONER'S REPLY BRIEF

This Reply Brief is respectfully submitted by petitioner, Thomas Ricci, in response to the briefs filed by respondents Chicago Mercantile Exchange, Everette B. Harris, William Phelan, Leo Melamed (hereinafter sometimes collectively referred to as "respondent CME") and the brief filed by the Siegal Trading Company and Joseph E. Sie-

gal (hereinafter sometimes referred to collectively as "respondent Siegal").*

I. RESPONDENTS HAVE MISSTATED THE POSTURE OF THE CASE BEFORE THIS COURT.

Underlying respondents' briefs is the theme that the Exchange was engaged only in ordinary self-regulatory activities and was merely interpreting one of its own rules concerning the transfer of memberships. Thus, respondent CME warns against "harassing antitrust suits" which would somehow interfere with the Exchange's functions (CME pp. 16-19). Similarly, respondent Siegal urges that arbitration was open to petitioner but that he failed to avail himself of the opportunity to arbitrate (Siegal pp. 16-18). Respondents' arguments assume that the complaint alleges merely that a membership transfer somehow went awry and that this case is simply a question of whether the Exchange enforced its rules. However, the complaint alleges not a routine membership transfer, but rather that the Exchange "willfully, unlawfully, knowingly and maliciously confederated, combined, conspired and agreed . . ." with respondent Siegal to prevent petitioner from trading. (Complaint, ¶14, App. p. 11).

On a motion to dismiss, well pleaded allegations of a complaint must be accepted as true. *Walker Process Equipment, Inc.* v. *Food Machinery and Chemical Corp.*, 382 U.S. 172, 174-175 (1965). The Court of Appeals in this case found that the complaint stated a cause of action under the antitrust laws. The Court of Appeals held:

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* References to the brief of respondent CME will be abbreviated "CME p. ...." and to the brief of respondent Siegal "Siegal p. ....".

"Accepting as we must appellant's allegations as to the reasons and manner in which he was excluded, there is no justification for the actions of the Exchange and the individual defendants. The transfer of his membership in violation of the rules of the Exchange and pursuant to a conspiracy to intentionally injure his business would constitute a group boycott, *per se* actionable under the Sherman Act." (App. p. 36)

Respondents have not petitioned for certiorari to review the holding of the Court of Appeals. Thus, this Court has before it the unchallenged finding that respondents' conduct constituted a group boycott, a *per se* violation of Section 1 of the Sherman Act. *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959). The issue before this Court is therefore not the reasonableness of respondents' conduct, but whether it is proper to refer a *per se* antitrust violation to an agency which cannot enforce the antitrust laws nor exempt violations thereof.

Respondents, to avoid the allegations of the complaint, cite excerpts from a deposition of petitioner and certain documents, thereby attempting to convert this matter from a motion to dismiss under Rule 12(b) of the Federal Rules of Civil Procedure to a motion for summary judgment under Rule 56. This tactic was rejected in the Court of Appeals just as it should be rejected here. (Opinion, App. 34-35) Respondents have failed to inform the Court that when they filed their motions to dismiss,* the trial

* Respondent CME's motion was entitled "Motion to Dismiss for Lack of Jurisdiction Over the Subject Matter", respondent Siegal's motion was entitled "Motion to Dismiss". (App. pp. 20-21).

court ordered petitioner not to pursue discovery pending disposition of the motions. Respondents, thus, ask the Court to accept their view of the case based upon one-sided discovery. Respondents' reliance upon partially gathered evidence to which petitioner, by order of the trial court, was unable to respond is clearly improper. See, *Costen* v. *Pauline's Sportswear, Inc.*, 391 F.2d 81, 84 (9th Cir., 1968); *Cohen* v. *Cahill*, 281 F.2d 789 (9th Cir., 1960). Respondents' references to the Ricci deposition and the various documents attached thereto should thus be disregarded. This is a case which arises on the pleadings and should be treated as such.

II. THE REGULATORY STRUCTURE IN THIS CASE DOES NOT REQUIRE AGENCY DETERMINATION OF ANTITRUST ISSUES.

Although respondents urge primary reference to the Commodity Exchange Commission (hereinafter "CEC") and/or the Secretary of Agriculture (hereinafter "the Secretary") to determine antitrust issues, they fail to discuss the provisions of the regulatory statute. The statute (7 U.S.C. §13a) expressly limits the agency to the enforcement of the Commodity Exchange Act (hereinafter "CEA"), not the Sherman Act. With equal clarity, the CEA provides no authority to the CEC or the Secretary to exempt respondents from antitrust prohibitions. Nonetheless, respondents seek not merely a preliminary agency determination of factual issues, but exemption for their conduct. Respondents urge that the CEC and/or the Secretary should be given the opportunity to examine the reasonableness of their conduct. (See, e.g., CME pp. 22-23). The complaint, however, charges a *per se* violation of the antitrust laws and this Court has repeatedly held that *per se* offenses cannot be justified. *United States* v.

Topco Associates, 405 U.S. 596, 609-612 (1972); *Northern Pacific Railway Co.* v. *United States,* 356 U.S. 1, 5 (1958); *Fashion Originators Guild* v. *Federal Trade Commission,* 312 U.S. 457 (1941). Clearly an administrative determination cannot be used to evade the thrust of the *per se* rules by a consideration of the reasonableness of the conduct in question. In *Topco,* this Court stated:

> "There have been tremendous departures from the notion of a free enterprise system as it was originally conceived in this country. These departures have been the product of congressional action and the will of the people. If a decision is to be made to sacrifice competition in one portion of the economy for greater competition in another portion, this too is a decision which must be made by Congress, and not by private forces or by the courts." (405 U.S. at 611)

In this case, Congress has confined the administrative agency to certain specified areas of regulation. This Court should reject respondents' attempt to dilute the *per se* rule. The Court should not permit the agency to determine the reasonableness of conduct when Congress has not given it that authority.

A. The Regulatory Scheme is Not Pervasive.

As the CEA provides no antitrust exemption, respondents have attempted to divine an exemption from the powers which the agency has in other areas. Respondents urge that the regulatory power of the CEC and the Secretary is "pervasive" and will support an implied exemption. But the term "pervasive" in primary jurisdiction cases means not merely that the administrator has broad regulatory powers, but rather that Congress has decided to replace competition with regulation in a particular

area. *United States* v. *Radio Corporation of America*, 358 U.S. 334, 346 (1959). Respondents have listed in detail the regulatory powers of the Secretary (CME pp. 11-12, 29-30; Siegal pp. 12-15). However, an examination of these regulatory duties shows that the determination of factual issues in a group boycott case will not disturb the regulatory functions of the administrator. The Secretary is empowered to:

1. Promulgate regulations to effectuate or accomplish "any of the purposes of *this chapter*". (7 U.S.C. §12a(5)) (emphasis supplied).

2. Register commission merchants and require that they maintain records and file reports. (7 U.S.C. §6f, g).

3. Disapprove any contract market rule relating to "terms and conditions in contracts of sale to be executed on or subject to the rules of such contract market or related to other trading requirements." (7 U.S.C. §12a(7)).

4. Prevent manipulation of futures prices, fraud, "bucketing" orders and other similar manipulative conduct. (See, 7 U.S.C. §6a, b, c).

The Secretary may also issue cease and desist orders, suspend contract markets or report criminal violations of the Act to the Department of Justice for prosecution. (7 U.S.C. §13, 13a-c). The Act also requires contract markets to enforce all rules relating to "terms and conditions in contracts of sale to be executed on or subject to the rules of such commodity market", and those rules which relate to "minimum financial standards and reporting requirements" for commission merchants. (7 U.S.C. §7a(8)(9)).

The Secretary may decline to report "minor violations" if he deems that "the public interest does not require such action." (7 U.S.C. §13c(b)).

None of these duties or enforcement objectives are in any way concerned with or designed to prevent a conspiracy between a contract market, its officers and one of its members to exclude another from trading. Respondents have failed to show that a guilty finding by a jury in a federal court based on the facts alleged in the complaint would have any effect upon the regulatory system. On the other hand, respondents imply that if the Secretary chose not to report respondents' conduct as a "minor violation" of the CEA, it would thereupon be exempt from the antitrust laws. Nothing in the statute authorizes this conclusion.

Congress has declined to replace competition as fostered by the antitrust laws with regulation in this industry. The brief of the United States, *amicus curiae*, sets out in detail the distinction between those industries (such as transportation) where regulation has replaced competition and commodities trading where no such substitution is contemplated. (See, Brief of Amicus Curiae, pp. 14-19, 22-25, see also, petitioner's brief, pp. 12-19). The regulation contemplated by the Commodity Exchange Act govern only certain clearly defined aspects of commodities trading. The administrator is not authorized to substitute regulation for competition.

Moreover, the United States, which allocates enforcement duties among its constituent agencies, has urged that petitioner's antitrust claim should be adjudicated in the District Court. The United States states:

> "The United States is interested in maintaining the proper division of responsibility between regulatory

agencies and the federal courts in the antitrust area, since an improper application of the primary jurisdiction doctrine could seriously impede the enforcement of the fundamental national economic policy which is expressed in federal antitrust laws." (Brief of Amicus Curiae, p. 2)

The government's position is particularly significant in this case since one of the three members of the CEC is the Attorney General of the United States, who filed a brief *amicus curiae*. If Congress has not given, and the executive branch has not sought, antitrust powers for the Secretary or the CEC, this Court should not engraft such authorization onto the regulatory statute.

B. This Court's Decision in Silver Does Not Authorize Antitrust Exemption in this Case.

Respondents rely on this Court's decision in *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963) as authority for exempting them from antitrust liability for participation in a group boycott. In *Silver*, the Exchange had ordered certain of its members to sever direct wire service with plaintiff, a non-member of the Exchange. This Court stated explicitly that the issue of primary jurisdiction was not before the Court. There the regulatory agency (the Securities and Exchange Commission) had power to disapprove Exchange rules similar to that which the Secretary has under the Commodity Exchange Act. But there as here, the agency had no jurisdiction to review the enforcement of such rules by exchanges. This Court stated:

"Although the Act gives to the Securities and Exchange Commission the power to request exchanges to make changes in their rules, §19(b), 15 U.S.C. §78s(b), and impliedly, therefore, to disapprove any

rules adopted by an exchange, . . . it does not give the Commission jurisdiction to review particular instances of enforcement of exchange rules. . . . This aspect of the statute, for one thing, obviates any need to consider whether petitioners were required to resort to the Commission for relief before going into court. Compare Georgia v. Pennsylvania R. Co., supra, 324 U.S. at 455. Moreover, the Commission's lack of jurisdiction over particular applications of exchange rules means that the question of antitrust exemption does not involve any problem of conflict or coextensiveness of coverage with the agency's regulatory power. . . . [citing cases] The issue is only that of the extent to which the character and objectives of the duty of exchanges self-regulation contemplated by the Securities Exchange Act are incompatible with the maintenance of an antitrust action." (373 U.S. at 357-358)

In this case, there exists no conflict between the administrative objectives in clearly defined areas and the application of antitrust laws to a group boycott against petitioner.

In 1968, with this Court's decision in *Silver* presumably before it, Congress amended the Commodity Exchange Act. It is significant that Congress chose not to include in those amendments any provision which would equate the Exchange's self-government functions with antitrust exemption.

C. Respondents Misinterpret the "Arguably Lawful" Doctrine.

Respondent Siegal's interpretation of the "arguably lawful" doctrine (Siegal, pp. 26-28) has no support in the authorities. Respondent's conduct cannot be justified by the regulatory act or by agency action taken under an

express or plainly implied provision of the CEA. *Carnation Co.* v. *Pacific Westbound Conference,* 383 U.S. 213, 221-222 (1966); *Allied Air Freight, Inc.* v. *Pan American World Airways,* 393 F.2d 441 (2d Cir., 1968), *cert. denied,* 395 U.S. 846 (1968); *Marnell* v. *United Parcel Service of America,* 260 F.Supp. 391, 412 (N.D.Cal., 1966); *Breen Air Freight, Ltd.* v. *Air Cargo, Inc.,* 1971 CCH Trade Case. ¶73,775 (S.D.N.Y., 1971). (See petitioner's brief, pp. 20-22).

The application of this rule is not, as respondent Siegal urges, (p. 27) dependent upon whether there was a prior administrative determination. In each of the decisions above cited, the matter had not been before an administrative agency. Indeed, in each of those cases, the issue was whether primary reference to the agency was proper under the doctrine of primary jurisdiction. Respondent Siegal argues that only the administrator can determine whether the antitrust violation was lawful under the regulatory statute. (Br. 27) The decisions in the above cases are clear that where, as here, the complaint seeks damages for past conduct which is not even of "debatable legality" under the regulatory scheme, primary reference to the administrator is improper.

Here, petitioner seeks damages for injury caused by a conspiracy between the Exchange, its officers and a member. This was an ordinary business conspiracy the formation and execution of which were not submitted to the administrator for approval. Since petitioner does not seek an injunction which would alter future transactions, an adjudication by a jury in the federal district court will in no way interrupt the administrator's regulatory functions.

CONCLUSION

By virtue of the foregoing, petitioner respectfully prays that the judgment of the court below be reversed and the cause remanded for further proceedings.

Respectfully submitted,

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NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

RICCI *v.* CHICAGO MERCANTILE EXCHANGE ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 71–858. Argued October 18, 1972—Decided January 9, 1973

Petitioner filed an antitrust complaint charging respondents with conspiring to restrain his business by transferring to another person petitioner's Chicago Mercantile Exchange membership, without notice and hearing, and in violation of Exchange rules and the Commodity Exchange Act. The District Court dismissed the complaint. The Court of Appeals reversed but held that the antitrust action should be stayed. *Held:* The Court of Appeals correctly determined that the antitrust proceedings should be stayed until the Commodity Exchange Commission can pass on the validity of respondents' conduct under the Commodity Exchange Act. Though the Commission cannot decide whether the Act and rules immunize conduct from the antitrust laws, the Commission's determination of whether the Exchange's rules were violated as petitioner claims or were followed requires a factual determination within the special competence of the Commission. That determination will greatly aid the antitrust court in arriving at the essential accommodation between the antitrust and regulatory regime. Pp. 9–19.

447 F. 2d 713, affirmed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, BLACKMUN, and REHNQUIST, JJ., joined. BURGER, C. J., filed a concurring opinion. DOUGLAS, J., filed a dissenting opinion. MARSHALL, J., filed a dissenting opinion, in which DOUGLAS, STEWART, and POWELL, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 71-858

Thomas Ricci, Petitioner, *v.* Chicago Mercantile Exchange et al. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[January 9, 1973]

MR. JUSTICE WHITE delivered the opinion of the Court.

The question before us is whether in this antitrust case the Court of Appeals for the Seventh Circuit properly stayed further judicial action pending administrative proceedings which the court deemed available under the Commodity Exchange Act, 7 U. S. C. § 1, *et seq.*

The case began when petitioner Ricci filed a complaint against the Chicago Mercantile Exchange, its president, vice president, and chairman of the board, and against the Siegel Trading Company, a member of the Exchange, and its president, charging a conspiracy in violation of the Sherman Act, 15 U. S. C. § 1. The complaint alleged that Ricci had purchased a membership in the Exchange in 1967 using funds borrowed from the Trading Company and that in February 1969 the Exchange, at the instance of the Trading Company, transferred the membership to another, without notice and hearing, utilizing a blank transfer authorization that had previously been revoked.[1] Allegedly, this

[1] Petitioner alleged in his complaint that when he was informed that Siegel Trading Company claimed to be the owner of his membership, he notified the Exchange that he was the owner of the membership; that Siegel was indebted to him for $18,000 in broker-

course of conduct violated both the rules of the Exchange and the Commodity Exchange Act and was pursuant to an unlawful conspiracy aimed at restraining the conduct of Ricci's business. The result was, the complaint asserted, that Ricci was excluded from trading on the Exchange from February 11, 1969, until March 4, 1969, when he purchased another membership at a considerably higher price than the transferred membership had previously cost.

On motion of respondents, the District Court dismissed the complaint. The Court of Appeals reversed that judgment; but because the challenged conduct was deemed subject to the jurisdiction of the Secretary of Agriculture (Secretary) or the Commodity Exchange Commission (Commission) by virtue of the provisions of the Commodity Exchange Act, the District Court was directed to stay further proceedings to permit administrative action to take place. 447 F. 2d 713 (CA7 1971). We granted certiorari, 405 U. S. 953 (1972), and now affirm the judgment of the Court of Appeals.

I

The Commodity Exchange Act,[2] first passed in 1922 and from time to time amended—the most recent substantial amendments being in 1968—makes dealing in

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age fees which offset the $15,000 he had borrowed to acquire his membership; and that Siegel did not have a lien on his membership under the rules of the Exchange. App., at 11.

[2] Recognising the public interest involved in "[t]ransactions in commodity involving the sale thereof for future delivery ['futures']" and the burden upon interstate commerce imposed by "sudden or unreasonable fluctuations in prices," 7 U. S. C. § 5, Congress, to regulate "futures" transactions, passed the "Grain Futures Act," 42 Stat. 998, the title being changed to the present "Commodity Exchange Act" in 1936, 49 Stat. 1491. The constitutionality of regulating futures trading under the Commerce Clause, Art. 1, § 8, Cl. 3, of

commodity futures a crime except when undertaken by or through members of a board of trade which meets certain statutory criteria and which is designated as

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the Constitution was upheld in *Board of Trade of the City of Chicago v. Olsen*, 262 U. S. 1 (1923).

The following will indicate the content and scope of the Act: Trading in futures is to be done only by or through a member of a "contract market," 7 U. S. C. §§ 6 and 6h. The Commodity Exchange Commission (Commission) may take measures to prevent excessive speculation, *id.*, § 6a, and certain other transactions are prohibited, *id.*, §§ 6a and 6c. Futures commission merchants and floor brokers must register with the Secretary of Agriculture (Secretary) (a member of the Commodity Exchange Commission, *id.*, § 2), *id.*, §§ 6d and 6e, and to do so, must meet certain financial requirements, *id.*, § 6f. Customer's money, securities and property must be handled in a prescribed fashion, *id.*, § 6, and futures commissions merchants and floor brokers must meet reporting and record-keeping requirements established by the Secretary and keep such books and records open for inspection, *id.*, § 6g. Specified transactions must be reported to the Secretary and books and records of same kept, which shall be subject to inspection, *id.*, § 6i. To be designated a "contract market" a board of trade must meet certain conditions and requirements, *id.*, § 7; and a contract market must perform certain duties, *id.*, § 7a. The contract market can have its designation suspended or revoked, *id.*, §§ 7b and 8, or be subjected to cease and desist orders, *id.*, § 13a. For stated reasons persons may be excluded from trading on a contract market by the Secretary, *id.*, § 9, or be subjected to a cease and desist order, *id.*, § 13b, and it is unlawful for such persons to trade while banned, *id.*, § 12b. Contract markets are not to exclude from membership cooperative associations or corporations except under certain conditions, *id.*, § 10a. A contract market may have its designation vacated and subsequently be redesignated, *id.*, § 11. The Secretary of Agriculture may make investigations and reports, *id.*, § 12, and may disclose the names of traders on commodity markets, *id.*, § 12–1. Certain acts may be punished as felonies or misdemeanors, *id.*, §§ 13, 13–1, 13a, and 13b. Persons involved in violations of the Act or rules issued thereto may be held responsible as principals, *id.*, § 13c (a). The Secretary of Agriculture or Commodity Exchange Commission is not required to report minor violations of the Act "for prosecution, whenever it appears that the public interest does not require such action." *id.*, § 13c (b).

a "contract market" by the Secretary of Agriculture. 7 U. S. C. §§ 6 and 6h.[3] Contract markets must file with the Secretary their bylaws, rules and regulations and have the express statutory duty to enforce all such prescriptions (1) "which relate to terms and conditions in contracts of sale . . . or relate to other trading require-

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[3] 7 U. S. C. § 6 provides:

"It shall be unlawful for any person to deliver for transmission through the mails or in interstate commerce by telegraph, telephone, wireless, or other means of communication any offer to make or execute, or any confirmation of the execution of, or any quotation or report of the price of, any contract of sale of commodity for future delivery on or subject to the rules of any board of trade in the United States, or for any person to make or execute such contract of sale, which is or may be used for (a) hedging any transaction in interstate commerce in commodity or the products or by-products thereof, or (b) determining the price basis of any such transaction in interstate commerce, or (c) delivering commodity sold, shipped, or received in interstate commerce for the fulfillment thereof, except, in any of the foregoing cases, where such contract is made by or through a member of a board of trade which has been designated by the Secretary of Agriculture as a "contract market," as hereinafter provided in this chapter, and if such contract is evidenced by a record in writing which shows the date, the parties to such contract and their addresses, the property covered and its price, and the terms of delivery: *Provided*, That each board member shall keep such record for a period of three years from the date thereof, or for a longer period of the Secretary of Agriculture shall so direct, which record shall at all times be open to the inspection of any representative of the United States Department of Agriculture or the United States Department of Justice."

7 U. S. C. § 6h states:

"It shall be unlawful for any person—

"(1) to conduct any office or place of business anywhere in the United States or its territories for the purpose of soliciting or accepting any orders for the purchase or sale of any commodity for future delivery, or for making or offering to make any contracts for the purchase or sale of any commodity for future delivery, or for conduct-

ments, and which have not been disapproved by the Secretary of Agriculture pursuant to" his statutory authority, *id.*, § 7a (8),[4] or (2) "which provide minimum financial

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ing any dealings in commodities for future delivery, that are or may be used for

"(A) hedging any transaction in interstate commerce in such commodity or the products or byproducts thereof, or

"(B) determining the price basis of any such transaction in interstate commerce, or

"(C) delivering any such commodity sold, shipped, or received in interstate commerce for the fulfillment thereof,

"if such orders, contracts, or dealings are executed or consummated otherwise than by or through a member of a contract market; or

"(2) falsely to represent such person to be a member of a contract market, or the representative or agent of such member, or to be a futures commission merchant registered under this chapter, or the agent of such registered futures commission merchant, in soliciting or handling any order or contract for the purchase or sale of any commodity in interstate commerce or for future delivery, or falsely to represent in connection with the handling of any such order or contract that the same is to be or has been executed on, or by or through any member of, any contract market."

[4] 7 U. S. C. § 7a (8) provides:

"Each contract market shall—

. . . . .

"(8) Enforce all bylaws, rules, regulations, and resolutions, made or issued by it or by the governing board thereof or any committee, which relate to terms and conditions in contracts of sale to be executed on or subject to the rules of such contract market or relate to other trading requirements, and which have not beeen disapproved by the Secretary of Agriculture pursuant to paragraph (7) of section 12a of this title; and revoke and not enforce any such bylaw, rule, regulation, or resolution made, issued, or proposed by it or by the governing board thereof or any committee, which has been so disapproved . . . ."

Disapproval by the Secretary is to be pursuant to 7 U. S. C. § 12a (7), which provides:

"The Secretary of Agriculture is authorised—

. . . . .

"(7) to disapprove any bylaw, rule, regulation, or resolution made, issued or proposed by a contract market or by the governing board

standards and related reporting requirements for futures commission merchants who are members of such contract market, and which have been approved by the Secretary of Agriculture," *id.*, § 7a (9).[5] If any contract market is not enforcing its rules of government made a condition of its designation, or if it is violating any provision of the Act, the Commodity Exchange Commission, an official agency established by the Act,[6] is authorized, upon notice and hearing and subject to judicial review, to suspend or revoke the designation of the Exchange as a contract market, *id.*, § 8 (a),[7] or may

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thereof or any committee which relates to terms and conditions in contracts of sale to be executed on or subject to the rules of such contract market or relates to other trading requirements, when he finds that such bylaw, rule, regulation, or resolution violates or will violate any of the provisions of this chapter, or any of the rules, regulations, or orders of the Secretary of Agriculture or the commission thereunder."

[5] 7 U. S. C. § 7a (9) states:

"Each contract market shall—

. . . . .

"(9) Enforce all bylaws, rules, regulations, and resolutions made or issued by it or by the governing board thereof or by any committee, which provide minimum financial standards and related reporting requirements for futures commission merchants who are members of such contract market, and which have been approved by the Secretary of Agriculture."

[6] The Commission is comprised of the Secretaries of Agriculture and Commerce and the Attorney General, or their designees, the Secretary of Agriculture or his designee serving as chairman, 7 U. S. C. § 2.

[7] 7 U. S. C. § 8 (a) provides:

"The commission is authorized to suspend for a period not to exceed six months or to revoke the designation of any board of trade as a "contract market" upon a showing that such board of trade is not enforcing or has not enforced its rules of government made a condition of its designation as set forth in section 7 of this title or that such board of trade, or any director, officer, agent, or employee thereof, otherwise is violating or has violated any of the provisions of this chapter or any of the rules, regulations, or orders of the Secretary of Agriculture or the commission thereunder. Such sus-

order a contract market and any director, officer, agent or employee to cease and desist from such conduct, *id.*, § 13a.[8] Under the relevant regulations, any inter-

pension or revocation shall only be after a notice to the officers of the board of trade affected and upon a hearing: *Provided*, That such suspension or revocation shall be final and conclusive, unless within fifteen days after such suspension or revocation by the commission such board of trade appeals to the court of appeals for the circuit in which it has its principal place of business, by filing with the clerk of such court a written petition praying that the order of the commission be set aside or modified in the manner stated in the petition, together with a bond in such sum as the court may determine, conditioned that such board of trade will pay the costs of the proceedings if the court so directs. The clerk of the court in which such a petition is filed shall immediately cause a copy thereof to be delivered to the Secretary of Agriculture, who shall thereupon notify the other members of the commission and file in the court the record in such proceedings, as provided in section 2112 of Title 28. The testimony and evidence taken or submitted before the commission, duly filed as aforesaid as a part of the record, shall be considered by the court of appeals as the evidence in the case. The proceedings in such cases in the court of appeals shall be made a preferred cause and shall be expedited in every way. Such a court may affirm or set aside the order of the commission or may direct it to modify its order. No such order of the commission shall be modified or set aside by the court of appeals unless it is shown by the board of trade that the order is unsupported by the weight of the evidence or was issued without due notice and a reasonable opportunity having been afforded to such board of trade for a hearing, or infringes the Constitution of the United States, or is beyond the jurisdiction of the commission.

[8] 7 U. S. C. § 13a states:

"If any contract market is not enforcing or has not enforced its rules of government made a condition of its designation as set forth in section 7 of this title, or if any contract market, or any director, officer, agent, or employee of any contract market otherwise is violating or has violated any of the provisions of this chapter or any of the rules, regulations, or orders of the Secretary of Agriculture or the commission thereunder, the commission may, upon notice and hearing and subject to appeal as in other cases provided for in paragraph (a) of section 8 of this title, make and enter an order directing that such contract market, director, officer, agent, or

ested person having information concerning such violation may request the Commission to institute proceedings, or the Commission may initiate proceedings on its own motion,[9] and there is provision for persons seeking intervention in such proceedings.[10]

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employee shall cease and desist from such violation, and if such contract market, director, officer, agent, or employee thereafter and after the lapse of the period allowed for appeal of such order or after the affirmance of such order, shall fail or refuse to obey or comply with such order, such contract market, director, officer, agent, or employee shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than $500 nor more than $10,000 or imprisoned for not less than six months nor more than one year, or both. Each day during which such failure or refusal to obey such order continues shall be deemed a separate offense."

[9] 17 CFR § 0.53 provides:

"(a) *Application to institute proceedings.* Any interested person having any information of any violation of the act, or of any of the orders or regulations promulgated thereunder, by any board of trade or by any director, officer, agent, or employee thereof may file with the Act Administrator [see *infra*] an application requesting the institution of such proceeding as is authorized under the act. Such application shall be in writing, signed by or on behalf of the applicant, and shall include a short and simple statement of the facts constituting the alleged violation and the name and address of the applicant and the name and address of the person against whom the applicant complains. [The "Act Administrator," who "administers and is responsible for the enforcement of the Act," *id.*, § 140.1, is the Administrator of the Commodity Exchange Authority, United States Department of Agriculture, *id.*, § 0.52 (r).]

"(b) *Status of applicant.* The person filing an application as described in paragraph (a) of this section shall have no legal status in the proceeding which may be instituted as a result of the application, except where the applicant may be permitted to intervene therein, in the manner provided in this subpart, or may be called as a witness, and the applicant's identity shall not be divulged by any employee of the Department, except with the applicant's prior consent or upon court order.

"(c) *Who may institute.* If, after investigation [by regional offices of the Commodity Exchange Authorities, *id.*, § 140.1 (d)] of the matters complained of in the application described in paragraph (a) of

[*Footnote 10 is on p. 9*]

II

It was against this statutory background that petitioner alleged he had been deprived of his membership contrary to the rules of the Exchange, the Commodity

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this section, or after investigation made on its own motion, the Commission has reason to believe that any board of trade or any director, officer, agent, or employee thereof has violated or is violating any of the provisions of the act, or of any of the regulations promulgated thereunder, the Commission will institute an appropriate proceeding: *Provided*, That in any case, except one of willfullness or one in which the public health, interest or safety otherwise requires, prior to the institution of a proceeding for the suspension or revocation of any designation of a contract market, facts or conditions which may warrant such action shall be called to the attention of the market in writing and such market shall be accorded opportunity to demonstrate or achieve compliance with all lawful requirements. Proceedings will be instituted only upon complaints issued by the Commission and will not be instituted upon pleadings filed by private persons."

Should the Commission institute proceedings after investigation, *id.*, unless the respondent is allowed by the Commission to consent to an order, *id.*, § 0.54, proceedings are held before a referee from the Department of Agriculture, *id.*, §§ 0.52 (p) and (s) and 0.55 *et seq.*, an oral hearing being granted on request, *id.*, § 0.61. The Commission prepares its order based on consideration of the record of the proceedings, including a report prepared by the referee, *id.*, §§ 0.66, 0.68, and 0.70, oral argument being held before the Commission in certain instances, *id.*, § 0.69.

[10] 17 CFR § 0.58 states:

"At any time after the institution of a proceeding, and before it has been submitted to the Commission for final consideration, the Commission or the referee may, upon petition in writing and for good cause shown, permit any person to intervene therein. The petition shall state with preciseness and particularity: (a) The petitioner's relationship to the matters involved in the proceeding, (b) the nature of the material he intends to present in evidence, (c) the nature of the argument he intends to make, (d) any other reason that he should be allowed to intervene."

As indicated in n. 2, *supra*, while the Commission has been vested with authority to take disciplinary action against a contract market

Exchange Act and the Sherman Act. And it was in this context that the Court of Appeals, having concluded that the specific exchange rules allegedly violated [11] were within the bounds of adjudicative and remedial jurisdiction of the Commodity Exchange Commission, directed the District Court to hold its hand and afford the opportunity for administrative consideration of the dispute between petitioner and the alleged co-conspirator-defendants.

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and its officers, agents, and employees, the Secretary has been given such authority against persons other than contract markets, including individuals, associations, partnerships, corporations, and trusts, 7 U. S. C. § 2, and may either exclude them from trading on a contract market, *id.*, § 9, or may issue a cease and desist order, *id.*, § 13b. The regulations providing for institution of and intervention in disciplinary proceedings before the Secretary, 17 CFR §§ 0.3 and 0.8, are virtually identical to the regulations for Commission proceedings quoted above and in n. 9, *supra*.

[11] Rules the Court of Appeals found related to "trading requirements" were Rule 307 which provides for the sale of membership, and Rule 322 which concerns qualifications to trade.

Rule 307 provides:

"Membership in the Exchange is a personal privilege subject to sale and transfer only as authorized herein. When a member or the legal representative of a deceased or incompetent member desires to sell a membership, he shall sign an authorization to transfer in such form as shall be prescribed by the Board. An individual who desires to purchase a membership shall notify the President to such effect and when an argument with a seller shall have been made shall sign a confirmation of purchase and shall deposit with the President a transfer fee in the amount of $100.00 and also a certified check, payable to the Exchange, for the amount of the agreed purchase price."

Rule 322 states:

"A member may be qualified to trade on the Spot and To-Arrive Calls provided he has been authorized by a firm or corporation which has been qualified pursuant to Rule 810 to engage in trading on said calls. A member may be qualified to trade on the futures call provided he has been authorized by a firm or corporation which is a Clearing Member."

The problem to which the Court of Appeals addressed itself is recurring.[12] It arises when conduct seemingly within the reach of the antitrust laws is also at least arguably protected or prohibited by another regulatory statute enacted by Congress. Often, but not always, the other regime includes an administrative agency with authority to enforce the major provisions of the statute in accordance with that statute's distinctive standards, which may or may not include concern for competitive considerations.

Silver v. *New York Stock Exchange*, 373 U. S. 341 (1963), was a case where the conduct challenged in an antitrust complaint was not within the jurisdiction of an administrative agency but was nevertheless claimed to be immune from antitrust challenge by virtue of the Securities Exchange Act of 1934. Silver sought to recover damages allegedly suffered when his wire connections with exchange members were terminated without notice or hearing under exchange rules adopted pursuant to the Securities Exchange Act of 1934, 15 U. S. C. § 78a *et seq.* Under this Act, the Securities and Exchange Commission had general power to approve or disapprove exchange rules, but it had no authority to deal with challenges, such as Silver's, to specific applications of exchange rules. Moreover, the statute conferred on the Exchange no express exemption from the antitrust

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[12] See, *e. g.*, *Carnation Co.* v. *Pacific Westbound Conference*, 383 U. S. 213 (1966); *United States* v. *Philadelphia National Bank*, 374 U. S. 321 (1963); *Silver* v. *New York Stock Exchange*, 373 U. S. 341 (1963); *Pan American World Airways* v. *United States*, 371 U. S. 296 (1963); *California* v. *Federal Power Commission*, 369 U. S. 482 (1962); *United States* v. *Radio Corporation of America*, 358 U. S. 334 (1959); *Far East Conference* v. *United States*, 342 U. S. 570 (1952); *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439 (1945); *United States* v. *Borden Co.*, 308 U. S. 188 (1939); *United States Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S. 474 (1932); *Keogh* v. *Chicago & N. W. R. Co.*, 260 U. S. 156 (1922).

laws. We declined to hold that Congress intended to oust completely the antitrust laws and supplant them with the self-regulatory scheme authorized by the Exchange Act. Repeal of the antitrust laws was to be implied "only if necessary to make the Exchange Act work, and even then only to the minimum extent necessary." 373 U. S., at 357. The question thus became the extent to which, if any, the "character and objectives of the duty of exchange self-regulation contemplated by the Securities Exchange Act are incompatible with the maintenance of the antitrust action." *Id.*, at 358. Conceding that the "entire public policy of self-regulation, beginning with the idea that the exchange may set up barriers to membership, contemplates that the exchange will engage in restraints of trade which might well be unreasonable absent sanction by the Securities Exchange Act," *id.*, at 360, and hence that "particular instances of exchange regulation which fall within the scope and purpose of the Securities Exchange Act may be regarded as justified in answer to the assertion of the antitrust claim," *id.*, at 361, the Court finally concluded that nothing in the terms or policy of the Act required or contemplated that a self-regulating Exchange be permitted to impose serious deprivations without notice and opportunity for a hearing, and that neither the statute nor exchange rules posed any legal barrier to the antitrust action.

In arriving at this conclusion, the Court expressly noted that the Securities and Exchange Commission had no authority to review specific instances of enforcement of exchange rules; that this "obviate[d] any need to consider whether petitioners were required to resort to the Commission for relief before coming into court," *id.*, at 358, and avoided "any problem of conflict or coextensiveness of coverage with the agency's regulatory power," *ibid.*; and that if there had been such jurisdic-

tion in the Commission with "ensuing judicial review . . . a different case would arise concerning exemption from the operation of laws designed to prevent anti-competitive activity, an issue we do not decide today." *Id.*, n. 12.

That "different case" is now before us, but in the context of the Commodity Exchange Act, and we agree with the Court of Appeals that, given administrative authority to examine the Ricci-Exchange dispute in the light of the regulatory scheme and exchange rules, the antitrust action should be stayed until the administrative officials have had opportunity to act. This judgment rests on three related premises: (1) that it will be essential for the Antitrust Court to determine whether the Commodity Exchange Act or any of its provisions are "incompatible with the maintenance of the antitrust action," *Silver* v. *New York Stock Exchange*, 373 U. S., at 358; (2) that some facets of the dispute between Ricci and the Exchange are within the statutory jurisdiction of the Commodity Exchange Commission; and (3) that adjudication of that dispute by the Commission promises to be of material aid in resolving the immunity question.[13]

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[13] Thus our judgment is not that Congress intended the Commodity Exchange Act to be the exclusive instrument for the governance of the Exchange and its members. The purpose and structure of the Act and our past cases appear to foreclose any such conclusion. *Carnation Co.* v. *Pacific Westbound Conference, supra; United States* v. *Philadelphia National Bank, supra; Silver* v. *New York Stock Exchange, supra; Pan American World Airlines* v. *United States, supra; United States* v. *Borden Co., supra.* Nor do we find that Congress intended the Act to confer general antitrust immunity on the Exchange and its members with respect to that area of conduct within the adjudicative or rule-making authority of the Commission or the Secretary. See *United States* v. *Philadelphia National Bank*, 374 U. S., at 350–354; *California* v. *Federal Power Commission, supra; Maryland & Virginia Milk*

As to the first premise, the argument that the Commodity Exchange Act to some extent limits the applicability of the antitrust laws and may limit them in this case is plainly substantial. Repeal of the antitrust laws is not to be lightly assumed. *United States* v. *Philadelphia National Bank*, 374 U. S. 321, 350 (1963); *Silver* v. *New York Stock Exchange*, *supra*, at 357; *California* v. *Federal Power Commission*, 369 U. S. 482, 485 (1962); *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439, 456–457 (1945); *United States* v. *Borden Co.*, 308 U. S. 188, 198 (1939). But here the express will of Congress is that to deal in commodity futures one must either be or deal through a member of a board of trade having specified qualifications and carrying official designation as a contract market. The Act clearly contemplates a membership organization and hence the existence of criteria for the acquisition, transfer, and loss of membership. The Chicago Mercantile Exchange has such membership rules, and it had the statutory duty to enforce them to the extent that they constituted or were related to "trading requirements," 7 U. S. C. § 7a (8). If the transfer of Ricci's membership was pursuant to a valid rule, the immediate question for the antitrust court is whether the rule itself and Ricci's exclusion under it are insulated from anti-

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Producers v. *United States*, 362 U. S. 458 (1960); *United States* v. *Radio Corporation of America*, 358 U. S., at 339–352. The Act contains no categorical exemption of this kind; indeed, it confers no express exemption at all, not even with respect to conduct that is directed or authorized by the Commission or the Secretary. Moreover, the area of administrative authority does not appear to be particularly focused on competitive considerations; there is no express provision in the Act directing administrative officials to consider the policies of the antitrust laws in carrying out their duties and there is no other indication that Congress intended the adjudicative authority given the Commission and the Secretary to be a complete substitute for judicial enforcement of the antitrust laws. Cf. *California* v. *Federal Power Commission*, *supra*.

trust attack. The question has substance, for the Commodity Exchange Act, like the Securities Exchange Act, contemplates that the Exchange and its members will "engage in restraints of trade which might well be unreasonable absent sanction" by the Act. *Silver* v. *New York Stock Exchange*, 373 U. S., at 360. See *Board of Trade of the City of Chicago* v. *United States*, 246 U. S. 231, 238 (1918). On the other hand, if, as Ricci alleges, loss of his membership was contrary to exchange rules, the antitrust action should very likely take its normal course, absent more convincing indications of congressional intent than are present here that the jurisdictional and remedial powers of the Commodity Exchange Commission are exclusive.

The question whether this membership dispute is within the jurisdiction of the Commodity Exchange Commission, the second premise for our judgment, was answered in the affirmative by the Court of Appeals. Because trading in futures may be done only by or through members, the membership rules of the Exchange were held to relate to "trading requirements" and were thus among those rules which the Exchange could not ignore without violating the Act and bringing itself within the jurisdiction of the Commission to adjudicate and remedy any violation "of the provisions of this chapter or any of the rules, regulations and orders of the Secretary . . . or the commission thereunder . . . ." 7 U. S. C. §§ 8 (a) and 13a. We need not finally decide the jurisdictional issue for present purposes, but there is sufficient statutory support for administrative authority in this area that the agency should at least be requested to institute proceedings.[14]

[14] The dissent complains that jurisdiction of the Commodity Exchange Commission is not clear, that the Commission need not institute proceedings, that the complainant must intervene to become a party and that agency remedies are discretionary. But proceeding

We also think it very likely that a prior agency adjudication of this dispute will be a material aid in ultimately deciding whether the Commodity Exchange Act forecloses this antitrust suit, a matter which seems to depend in the first instance on whether the transfer of Ricci's membership was in violation of the Act for failure to follow exchange rules. That issue in turn appears to pose issues of fact [15] and questions about the scope, meaning and significance of exchange membership rules. These are matters that should be dealt with in the first instance by those especially familiar with the customs and practices of the industry and of the unique marketplace involved in this case. *United States* v. *Western Pacific R. Co.*, 352 U. S. 59, 64–65, 65–66 (1956); *Far East Conference* v. *United States*, 342 U. S. 570, 574–575 (1952). They are matters typically lying at the heart of an administrative agency's task and here they appear to be matters which Congress has placed within the jurisdiction of the Commodity Exchange Commission. We should recognize "that the courts, while retaining the final authority to expound the

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by complaint and intervention is not an unusual system for invoking administrative action. And surely if administrative proceedings are sought in vain, there would be no further problem for the antitrust court. In any event it should be pointed out that the regulations require investigation of complaints and provide that "the Commission *will institute* an appropriate proceeding" if investigation reveals reason to believe that the Act is being violated. 17 CFR § 0.53. (Emphasis added.) See n. 9, *supra*.

[15] Likely issues for the fact-finder are whether Ricci revoked the transfer authorization before or after he was informed that his membership was transferred; whether the transfer authorization was valid; whether Siegel had a lien against Ricci's membership because of its loan to Ricci for the purchase of a membership; whether the Siegel owed brokerage fees to Ricci; and if so, whether these brokerage fees could be offset against the debt for the membership purchase.

statute, should avail themselves of the aid implicit in the agency's superiority in gathering the relevant facts and in marshaling them into a meaningful pattern." *Federal Maritime Board* v. *Isbrantsen Co.*, 356 U. S. 481, 498 (1958). The adjudication of the Commission, if it is forthcoming, will be subject to judicial review and would obviate any necessity for the antitrust court to relitigate the issues actually disposed of by the agency decision. Cf. *United States* v. *Philadelphia National Bank*, 374 U. S., at 353–354; *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U. S., at 498–499. Of course, the question of immunity, as such, will not be before the agency; but if Ricci's complaint is sustained, the immunity issue will dissolve, whereas if it is rejected and the conduct of the exchange warranted by a valid membership rule, the Court will be in a much better position to determine whether the antitrust action should go forward. Affording the opportunity for administrative action will "prepare the way, if the litigation should take its ultimate course, for a more informed and precise determination by the Court of the scope and meaning of the statute as applied to [these] particular circumstances." *Federal Maritime Board* v. *Isbrandtsen*, *supra*, at 498–499.

III

The dissent concedes, as it must, that it is essential for the antitrust court to make proper accommodation "between usual antitrust principles and the self-regulatory and exclusionary powers which the exchanges were obviously intended to exercise." It also concedes that where the regulatory regime is administered by an agency, the antitrust court will stay its hand to permit institution of administrative proceedings if they are "likely to make meaningful contribution to the resolution of this law

suit." Our differences thus narrow to whether proceedings in the Commodity Exchange Commission would be of sufficient aid to justify a stay of this antitrust action.

The dissent asserts that for present purposes the only relevant issue in the antitrust action is "whether either the rules, or their application, serve a legitimate self-regulatory goal," that the Commission has no jurisdiction to determine facts relevant to whether exchange rules are consistent with or essential to legitimate self-regulatory ends, and that we have mistakenly premised our opinion on the existence of such jurisdiction, without which there is no basis for deferring to agency proceedings.[16] This misapprehends our opinion and fails to come to grips with reality. We make no claim that the Commission has authority to decide either the question of immunity as such or that any rule of the Exchange takes precedence over antitrust policies. Rather, we simply recognize that Congress has established a specialized agency that would determine either that a membership rule of the Exchange has been violated or that it has been followed. Either judgment would require determination of facts and the interpretation and application of the Act and exchange rules. And either determination will be of great help to the antitrust court in arriving at the essential accommodation between the antitrust and the regulator regime: The problem disappears entirely if it is found that there has been a violation of the rule; on the other hand, if it is found that the Exchange has merely followed and en-

[16] The dissent also asserts that because Ricci's complaint asserts a conspiracy, the matter at issue lies beyond any possible self-regulatory goals of the Exchange. But this simply ignores and refuses to accept the fact-finding function of the Commission. It also fails to recognise that the allegation simply characterizes as a conspiracy what may be an attempt to invoke the membership rules of the Exchange.

forced its own rules, the antitrust court will be in position to make a more intelligent and sensitive judgment as to whether the antitrust laws will punish what an apparently valid rule of the Exchange permits.

Accordingly, the judgment is affirmed.

So ordered.

SUPREME COURT OF THE UNITED STATES

No. 71–858

Thomas Ricci, Petitioner, *v.* Chicago Mercantile Exchange et al.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[January 9, 1973]

MR. CHIEF JUSTICE BURGER, concurring.

As I read the Court's opinion, it plainly disclaims any resolution of the issue left open in *Silver* v. *New York Stock Exchange*, 373 U. S. 341—namely, the question of which "particular instances of exchange regulation" occurring within a statutory scheme providing for self-regulation may be regarded as "justified in answer to the assertion of an antitrust claim" against the Exchange and its members. Indeed, the *Silver* problem is not before us. The Court of Appeals was careful to note that it expressed "no opinion on any antitrust immunity that might result from action or inaction taken by the Commission or the Secretary of Agriculture in this case." *Ricci* v. *Chicago Mercantile Exchange*, 447 F. 2d 713, 720 n. 18.

The Court holds that the Commodity Exchange Commission may materially aid in proper consideration of petitioner's antitrust claims by determining whether the respondents violated a rule of the Exchange. The Court's opinion should not be read to suggest that the Commission's resolution of the dispute either will or will not foreclose subsequent application of the antitrust laws.

With this understanding, I join the Court's opinion.

SUPREME COURT OF THE UNITED STATES

No. 71–858

Thomas Ricci, Petitioner, *v.* Chicago Mercantile Exchange et al. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[January 9, 1973]

MR. JUSTICE DOUGLAS, dissenting.

While I concur in my BROTHER MARSHALL'S dissent, I wish to add that even if the Commodity Exchange Commission were empowered to make a determination regarding the relief sought by petitioner, it would appear to be an anomaly to direct the plaintiff in a civil action to a federal supervising agency for a determination as to whether the regulations which it is charged to enforce have been violated, when the agency has, by its inaction, already shown every indication of sanctioning the alleged violation. By remanding, we are requiring the petitioner to seek from the regulator an admission of their failure to regulate (or negligence in regulating).

The odds of petitioner getting the Commodity Exchange Commission now to find a violation in contradiction to its past inaction, do not in my view justify the expense and delay to the petitioner. In the interests of orderly and efficient judicial administration, parties are not generally required to engage in futile gestures. This inequity is even more pronounced, since as JUSTICE MARSHALL points out in his dissent, the Commodity Exchange Commission has neither the authority or power to make a determination on the issues underlying the civil action.

My concern about remitting parties in federal court litigation to state judicial and administrative agencies for resolution of collateral questions of law is stated in

my dissent in *Clay* v. *Sun Insurance Office*, 363 U. S. 207, 227–228; *England* v. *Louisiana State Board of Medical Examiners*, 375 U. S. 411, 429. The road this litigant is now required to travel to obtain justice is equally long and expensive and available only to those with long purses, even though he is remitted only to a federal regulatory agency.

SUPREME COURT OF THE UNITED STATES

No. 71–858

Thomas Ricci, Petitioner, *v.* Chicago Mercantile Exchange et al.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[January 9, 1973]

MR. JUSTICE MARSHALL, with whom MR. JUSTICE DOUGLAS, MR. JUSTICE STEWART, and MR. JUSTICE POWELL join, dissenting.

The majority accurately describes the provisions of the Commodities Exchange Act and the facts of this case. But my brethren nowhere explain why the lower court should stay its hand pending action by an agency which in all likelihood lacks the statutory power to resolve an issue in the lawsuit. Instead of carefully balancing the advantages and disadvantages of deferral to the agency, the Court seems to apply a mechanical test which requires judicial deference despite the substantial probability that the agency will have nothing of relevance to contribute. The principle which should govern this case can be stated quite adequately in a single sentence: An agency cannot have primary jurisdiction over a dispute when it probably lacks jurisdiction in the first place. The majority seemingly departs from this principle[1] and, hence, needlessly bifurcates

[1] The majority suggests that the Court "need not finally decide the jurisdictional issue for present purposes." Rather, it holds that the likelihood of agency jurisdiction is sufficient to require judicial abstention. This approach could well lead to an extraordinary result. Since the Court expressly leaves the jurisdictional issue open, it is possible that at some later date, it will be held that the agency lacks jurisdiction over this dispute. In that event, petitioner will have been forced to resort to possibly lengthy administrative pro-

and complicates a suit which could readily be resolved by the District Court. I must therefore respectfully dissent.

I

At the outset, it should be noted that the Commodities Exchange Act fails to provide petitioner with a means by which he can require the Commodities Exchange Commission or the Secretary of Agriculture to consider his case. The Act provides that "the Secretary of Agriculture *is authorized* . . . to disapprove any bylaw, rule, regulation, or resolution made, issued or proposed by a contract market." 7 U. S. C. § 12a (7) (emphasis added). Similarly, "If any contract market is not enforcing or has not enforced its rules of government made a condition of its designation . . . the commission *may* . . . make and enter an order directing that such contract market . . . shall cease and desist from such violation." 7 U. S. C. § 13a (emphasis added). But although the relevant regulations provide a means by which a private party may report apparent violations—see 17 CFR §§ 0.3 (a), 0.53 (a)—the Act nowhere requires the Secretary of the Commission to act on these reports. Cf. *Vaca* v. *Sipes*, 386 U. S. 171, 182 (1967). On the contrary, the Act expressly provides that "[n]othing in this chapter shall be construed as requiring the Secretary of Agriculture or the commission to report minor violations of this chapter for prosecution, whenever it appears that the public interest does not require such action." 7 U. S. C. § 13c (b).

Moreover, even if the Secretary or the Commission does institute proceedings at petitioner's behest, it is

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ceedings, only to be told at their conclusion that they were irrelevant to his case. My approach is somewhat different. I submit that the jurisdiction of the relevant agency is a threshold issue in cases such as this and that before a court defers to agency judgment, it should authoritatively determine whether the agency has power to act.

by no means certain that petitioner will be permitted to participate in those proceedings. The Commission's rules state that "The person filing an application [to institute proceedings] shall have no legal status in the proceeding which may be instituted as a result of the application, except where the applicant *may* be permitted to intervene therein . . . or may be called as a witness." 17 CFR § 0.53 (b) (emphasis added). See also 17 CFR § 0.3 (b). Although Commission rules provide for the intervention of private parties, the Commission apparently has unfettered discretion in deciding whether to allow intervention. See 17 CFR § 0.58. See also 17 CFR § 0.8.[2]

Should the Commission or the Secretary not allow intervention in this case, this Court's decision will leave the District Judge on the horns of a serious dilemma. Normally, when a court stays its hand to allow agency proceedings, the result of those proceedings may not be collaterally attacked when the case returns to the court. See, *e. g.*, *Port of Boston Marine Terminal Assn.* v. *Rederiaktiebolaget Transatlantic*, 400 U. S. 62, 71–72 (1970). But if the Commission decides a major issue in this lawsuit without allowing petitioner to intervene, failure to permit collateral attack would result in petitioner's antitrust case being resolved against him without his participation. On the other hand, if the District Court undertakes a *de novo* reconsideration of the issues

[2] I do not intend to foreclose the possibility that petitioner might be able to intervene under § 6 (a) of the Administrative Procedure Act, 5 U. S. C. § 555 (b). See, *e. g.*, *American Communications Assn.* v. *United States*, 298 F. 2d 648, 650 (CA2 1962). Petitioner's ability to invoke this provision is, however, problematical at best. Cf. *Easton Utilities Commission* v. *Atomic Energy Commission*, 137 U. S. App. D. C. 359, 362–365, 424 F. 2d 847, 850–853 (1970). See generally Shapiro, Some Thoughts on Intervention before Courts, Agencies, and Arbitrators, 81 Harv. L. Rev. 721, 764–767 (1968).

submitted to the Commission, the Commission's decision, together with the concomitant delay, will be for naught.

II

The Court, then, remands petitioner to a procedure which he has no power to invoke, in which he has no right to participate if it is invoked, and which cannot provide the remedy he seeks even if he is allowed to participate.[3] Yet all this might be justifiable if either the Commission or the Secretary were likely to make a meaningful contribution to the resolution of this lawsuit. We have held that "[w]hen there is a basis for judicial action, independent of agency proceedings, courts may route the threshold decision as to certain issues to the agency charged with primary responsibility for governmental supervision or control of the particular industry or activity involved." *Port of Boston Marine Terminal Assn.* v. *Rederiaktiebolaset Transatlantic, supra*, at 68. The reason for this policy is self-evident: "in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over." *Far East Conference* v. *United States*, 342 U. S. 570, 574 (1952).

Thus, if the Commodities Exchange Commission had jurisdiction over some aspect of this suit and special expertise in the area of its jurisdiction, a case could, perhaps, be made for awaiting its decision. For example, if the Commission had been given the power to grant general immunity to antitrust violators, sound judicial administration would require consultation with it before

[3] Although the Commission may issue cease and desist orders and recommend criminal prosecutions, it of course lacks authority to award treble damages.

proceeding with the antitrust suit. But, as the majority itself recognizes, there is no indication that Congress intended to grant the Commission any such power. As this Court held in *Carnation Co.* v. *Pacific Westbound Conference*, 383 U. S. 213, 218 (1966), "[w]e have long recognized that the antitrust laws represent a fundamental national economic policy and have therefore concluded that we cannot lightly assume that the enactment of a special regulatory scheme for particular aspects of an industry was intended to render the more general provisions of the antitrust laws wholly inapplicable to that industry." In practice, this principle has meant that "[r]epeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions." *United States* v. *Philadelphia National Bank*, 374 U. S. 321, 350–351 (1963) (footnotes omitted). Such repugnancy has been found to exist only in those rare cases where regulation of the industry is pervasive and Congress plainly intended to substitute Government supervision for competition. See, *e. g.*, *Pan American World Airways* v. *United States*, 371 U. S. 296 (1963). Cf. *United States* v. *Radio Corporation of America*, 358 U. S. 334 (1959).

Obviously, Congress has not granted the Commission the sort of pervasive power over commodities exchanges which would give rise to antitrust exemption. On the contrary, although the Commission and the Secretary have some general policing duties, day-to-day regulation has been largely left to the industry itself. Where, as here, the industry is given the power to control its own affairs, it is particularly important to make certain that this power is not abused for the purpose of eliminating competition. Cf. *Silver* v. *New York Stock Exchange*, 373 U. S. 341 (1963).

The majority cannot rely, then, on the Commission's general power to immunize antitrust violations. Its argument, as I understand it, is more subtle and, at the same time, more attenuated. As we recognized in *Silver* v. *New York Stock Exchange*, *supra*, the very purpose of an exchange is to exclude nonmembers from participation in trading. Were it not for the legislative authorization of such exchanges, they would constitute group boycotts which are *per se* violations of the Sherman Act. See, *e. g.*, *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U. S. 207 (1959). Thus, although Congress cannot be taken to have granted total antitrust immunity to trading exchanges, some accommodation must be reached between usual antitrust principles and the self-regulatory and exclusionary powers which the exchanges were obviously intended to exercise. In *Silver*, the Court reached such an accommodation by holding that "exchange self-regulation is to be regarded as justified in response to antitrust charges only to the extent necessary to protect the achievement of the aims of the Securities Exchange Act." 373 U. S., at 361. Thus, if an exchange rule serves a valid self-regulatory purpose, the mere fact that it excludes some individuals from competition does not mean that an antitrust violation has been made out. But where, as in *Silver* itself, the rule fails to serve any legitimate self-regulatory goal, its exclusionary effect can lay the predicate for a Sherman Act violation.

Applying *Silver* to the facts of this case, the majority argues that the Commission has primary jurisdiction to determine facts relevant to the question whether the Chicago Mercantile Exchange's rules and its application of those rules are in conformity with the self-regulatory purposes of the Commodities Exchange Act. Superficially, at least, that argument has considerable force.

It is marred, however, by two flaws which, in my view, make it ultimately fallacious.

First, it is important to note that petitioner's complaint does not merely allege that he has been excluded from trading or that an Exchange rule has been broken. Rather, he maintains that the Exchange and certain of its members entered a deliberate conspiracy against him and that this was done "maliciously, wilfully, knowingly, unlawfully, and without cause or provocation, with the unlawful and illegal intent and object of restraining and preventing plaintiff from exercising an essential and necessary part of his lawful trade or business in interstate commerce." Whatever the legitimate self-regulatory goals of the Chicago Mercantile Exchange, I cannot believe that they include the deliberate and malicious suppression of competition. Surely, the courts do not need the Commodities Exchange Commission to tell them that such conduct is antithetical to the purposes of the Commodities Exchange Act. We have held that principles of administrative comity preclude courts from finding antitrust violations "only . . . when the defendants' conduct is arguably lawful" under the administrative scheme., *Carnation Co.* v. *Pacific Westbound Conference*, 383 U. S. 213, 222 (1966). I would apply that principle here and hold that deliberate conspiracies with the sole purpose of suppressing competition are not "arguably lawful" under the Commodities Exchange Act.[4]

[4] This position does not, as majority argues, "ignore[] . . . the fact-finding function of the Commission." Rather, it is premised on the seemingly obvious proposition that there must be a jurisdictional predicate to support agency factfinding. I can find nothing in the Commodities Exchange Act which authorizes the Commission to determine whether exchanges and their members are engaged in conspiracies or whether the actions taken by exchanges are motivated by anticompetitive purposes. Nor is it clear to me why such factfinding might be made in the course of determining whether an exchange rule had been violated.

To be sure, it may ultimately develop that petitioner is unable to substantiate all of his allegations and that the actions of the Exchange are less sinister than he has made out. Petitioner might be required to submit affidavits before trial demonstrating that his allegations of a deliberate conspiracy are factually supported in order to forestall a remand to the Commission. And if it becomes clear at any time during trial that the conspiracy allegations are insubstantial, there will then be time enough to reconsider the propriety of a delay pending Commission action. But I would not deprive petitioner of immediate access to the courts until he has had an opportunity to prove that the case is as clear as he says it is.

Moreover, even if petitioner's allegations are for some reason insufficient to forestall a remand to the Commission, I still doubt that the Court of Appeals acted properly in ordering a stay of the litigation. The majority's position is premised on the assumption that the Commission has jurisdiction to determine facts relevant to whether Exchange rules, or the application of those rules, is consistent with legitimate self-regulatory ends.[5] But a careful examination of the Act makes plain that this assumption is simply incorrect.[6] Neither the agency nor the

[5] But cf. n. 1, *supra*.

[6] To be sure, as the majority recognizes, the Commission does have factfinding power and, in the course of determining whether the Exchange rules have been violated, it might exercise that power to resolve the underlying facts in dispute. But the majority cites no cases where the mere factfinding power of an agency has been used to invoke primary jurisdiction in the absence of an issue of law or a mixed question of law and fact common to the agency proceeding and the court action. The Commission may have special expertise which will aid it to determine whether a given rule has been violated or whether the rule is consistent with the Act. But it has no special ability to determine pure questions of fact unrelated to the legal standard relevant in the antitrust suit. On the con-

Secretary has been granted a roving commission to oversee the proper functioning of the various exchanges. Rather, the powers conferred in the Act are limited and discrete, and none of them grants to the Commission the tools necessary for resolving any issue in this dispute.

The Commission does have authority to oversee the exchanges' administration of their own rules. 7 U. S. C. § 7a (8) requires exchanges to "[e]nforce all bylaws, rules, regulations, and resolutions, made or issued by it or by the governing board thereof or any committee, which relate to . . . trading requirements," and 7 U. S. C. § 13a permits the Commission to issue a cease and desist order "[i]f any contract market is not enforcing or has not enforced its rules of government made a condition of its designation as set forth in section 7 of this title." But it should be obvious that these provisions do not authorize the Commission to resolve the *Silver* issue. The quoted sections permit the Commission to determine whether the rules made by an exchange are being enforced. But they do not permit the Commission to decide whether either the rules, or their application, serve a legitimate self-regulatory goal, which is the only relevant issue in the antitrust suit. Thus, it is entirely possible that although the Chicago Mercantile Exchange has respected its own rules to the letter, those rules themselves are impermissible under the Sherman Act. Similarly, even if the rules are facially permissible, it is possible that as applied in this case, they restrain competition without any off-setting self-regulatory gain. The mere fact that an exchange is obeying its own rules—the only question which 7 U. S. C. §§ 7a (8) and 13a

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trary, I had thought that it was our court system—with its long tradition of jury trials, adversary proceedings, and highly developed evidentiary principles—which was "expert" in the simple fact-finding process.

permit the Commission to answer—does not tell us whether either the rules or their application meet the *Silver* test.

The Secretary is given supplementary power to invalidate certain exchange rules. But this power too is extremely limited. 7 U. S. C. § 12a (7) empowers the Secretary to "disapprove any bylaw, rule, regulation, or resolution made, issued or proposed by a contract market . . . which relates to . . . trading requirements, when he finds that such bylaw, rule, regulation, or resolution violates or will violate any of the provisions of *this chapter*, or any of the rules, regulations, or orders of the Secretary of Agriculture or the commission thereunder." (Emphasis added.) The "chapter" referred to is, of course, the Commodities Exchange Act not the Sherman Act, and no provision of the Commodities Exchange Act incorporates Sherman Act principles. It follows that § 12a (7) does not empower the Secretary to invalidate exchange rules because they conflict with antitrust policy.

Moreover, as noted above, the restrictions placed on the exchanges by the Act are far from pervasive, and the Secretary's power to invalidate rules is therefore similarly restricted. Surely, this power does not include the ability to invalidate any rule which fails to serve a self-regulatory end. Such a reading of the Act would mean that Congress thought it had prohibited everything an exchange might do which would not serve self-regulatory purposes—a reading which defies common sense. Thus, if the Secretary were to refuse to invalidate the rules involved in this action, his decision would only mean that those rules were not prohibited by any specific provision of the Commodities Exchange Act. The decision could in no way be taken to mean that the rule

serves any useful purpose or that it meets the *Silver* requirement.[7]

III

I do not mean to suggest that the Commission's consideration of this case is certain to prove totally useless when the District Court ultimately resumes its deliberations. Should the Secretary invalidate the rules which the Commission relies on, for example, his action would materially aid petitioner, although his claim would still not be conclusively established since the Exchange's actions might be justified by a legitimate regulatory purpose, even though the rule relied upon violated a provision of the Act. Similarly, the Commission may make findings of fact or statements as to the law within areas of its expertise which the Court might find helpful.

But I had not thought that petitioner need meet the burden of showing that resort to administrative remedies would be totally useless before securing adjudication from a court. Indeed, in virtually every suit involving a regulated industry, there is something of value which an administrative agency might contribute if given the opportunity. But we have never suggested that such

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[7] The *Silver* case itself nearly illustrates this fact. In *Silver*, the rule in question provided for the termination of wire connections with exchange members without notice or hearing. This Court held that the failure to provide notice or hearing served no legitimate self-regulatory goal and therefore held that an antitrust violation had been made out. Had the *Silver* case arisen in the context of the Commodities Exchange Act, the Secretary could not have invalidated the Exchange rule since no provision of the Act requires an exchange to hold hearings before it takes disciplinary action. But of course the Secretary's decision not to invalidate the rule would in no way have changed the Court's ultimate conclusion that the rule served no valid self-regulatory purpose. Hence, invocation of the Secretary's primary jurisdiction would have been a useless act.

suits must therefore invariably be postponed while the agency is consulted.

It has been argued that the doctrine of primary jurisdiction involves a mere postponement, rather than relinquishment of judicial jurisdiction. See, *e. g.*, 3 K. Davis, Administrative Law Treatise 3–4 (1958). However, that observation should not be taken to mean that invocation of the doctrine therefore impose no costs. On the contrary, in these days of crowded dockets and long court delays, the doctrine frequently prolongs and complicates litigation. More fundamentally, invocation of the doctrine derogates from the principle that except in extraordinary situations, every citizen is entitled to call upon the judiciary for expeditious vindication of his legal claims of right. As we have said in a somewhat different context "due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." *Boddie* v. *Connecticut*, 401 U. S. 371, 377 (1971). And surely the right to a "meaningful opportunity to be heard" comprehends within it the right to be heard without unreasonable delay. This principle is especially worthy of protection in the antitrust field where it is unmistakably clear that Congress has given courts, rather than agencies, the primary duty to act. Cf. *California* v. *Federal Power Commission*, 369 U. S. 482, 487–490 (1962).

To be sure, judicial deference to agency jurisdiction remains important, particularly in those areas where the responsibilities of judges and administrators meet and overlap. But the primary jurisdiction doctrine, like the related exhaustion requirement, must not be "applied blindly in every case" without "an understanding of its purposes and of the particular administrative scheme involved." *McKart* v. *United States*, 395 U. S. 185, 193,

201 (1969). Wise use of the doctrine necessitates a careful balance of the benefits to be derived from utilization of agency processes as against the costs in complication and delay. Where the plaintiff has no means of invoking agency jurisdiction, where the agency rules do not guarantee the plaintiff a means of participation in the administrative proceedings, and where the likelihood of a meaningful agency input into the judicial process is remote, I would strike a balance in favor of immediate court action. Since the majority's scale is apparently differently calibrated, I must respectfully dissent.

END OF CASE